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PREPARED ON BEHALF OF THE
ALASKA STATEHOOD COMMITTEE
FOR THE
ALASKA CONSTITUTIONAL CONVENTION

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Constitutional Studies, Vol. 2

C O N S T I T U T I O N A L S T U D I E S

Prepared on behalf of the
ALASKA STATEHOOD COMMITTEE

for the

ALASKA
CONSTITUTIONAL CONVENTION

Convened
November 8, 1955

P U B L I C A D M I N I S T R A T I O N S E R V I C E

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THE LEGISLATIVE DEPARTMENT

A staff paper prepared by Public Administration
Service for the Delegates to the Alaska
Constitutional Convention

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THE LEGISLATIVE DEPARTMENT

State Government in the United States is uniquely an American product. Although the states represent wide variations in size, condition and other factors, they share in common a status which might be called "constitutional middlemen." In the formation of our Federal Union the states consented to strip themselves of certain powers which were delegated to the national government. The remaining powers, variously termed reserved or residual powers, were retained by the individual states. But within the states, the ultimate repositories of political power are the people. This constitutional belief of popular sovereignty when coupled with its companion doctrine of limited government, or the belief that certain powers and activities should be denied to government and government officials, led to the formulation of state constitutions which are essentially limitations on power. Indeed, a student of comparative government reading American state constitutions for the first time would find little in their legislative articles about the specific powers of state government in contrast to the multiplicity of limitations, prohibitions, and elaborate prescriptions governing conduct, procedures, and other details.

State Legislative Powers

As mentioned above, the lawmaking powers of state legislatures are restricted by certain powers given to the federal government. Article I of the Federal Constitution assigns certain functions to the federal government and definitely prohibits them to the states. Among the acts prohibited are the making of treaties, the granting of letters of marque and reprisal and the passing of bills of attainder, the coining of money, the passing of ex post facto laws, the making of anything but gold and silver legal tender for the payment of debts, the passing of laws impairing the obligation of contract, the granting of titles of nobility, the levying of tonnage or export duties, and finally, engaging in war or keeping troops or ships of war in time of peace. Even when dealing with a subject which comes within the scope of their constitutional authority, the state legislatures are restricted in the exercise of their power by important provisions of Amendment XIV; namely, those clauses which guarantee due process of law, equal protection of the laws, and the privileges and immunities of citizens.

Of course the legislature is also subject to such interpretations of the Federal Constitution and the constitution of the state as the courts may choose to give them. In addition to the normal hazards of judicial review, some state legislatures are confronted with the special doctrine of implied limitations

which has been designed by the courts to limit legislative powers by narrow interpretations of delegated powers. Theoretically, the legislature should be entitled to exercise those powers not denied to it by either the Federal or the state constitution; but when the expressed constitutional restrictions are reinforced by this narrow doctrine of interpretation, the lawmaking body is in a straitjacket.¹

Major Areas of State Activity and Power

Within the framework of the federal system and limitations imposed by state constitutions, the states undertake a wide variety of services--each of which from time to time, requires legislative deliberation and action. In most state constitutions a brief section stipulating that the legislative authority of the state is vested in the legislature has been sufficient to endow it with power to act in a wide variety of fields. These may be generally classified as follows:

1. Education: public school systems, institutions of special training and higher learning, and library services.
2. Highways, highway safety, and aviation.

¹ In Rathbone v. Wirth, 45 N. W. 15, 23 (1896) the Court of Appeals of New York gave a classic statement of the objectionable doctrine: "When the validity of legislation is brought in question, it is not necessary to show that it falls appropriately within some express written prohibition contained in the constitution. The implied restraints of the constitution upon legislative power may be as effectual for its condemnation as the written words, and such restraints may be either in the language employed or in the evident purpose which was in view and the circumstances and historical events which led to the enactment of the particular provisions as a part of the organic law."

3. Health and welfare programs.
4. Defense and public protection, including civil defense and state fire protection.
5. Corrections, including penal institutions and correctional systems.
6. Planning and development, including economic development, housing and urban redevelopment.
7. Natural Resources, including conservation, administration and research services.
8. Labor and industrial relations, including employment security administration.
9. Regulatory activities, including occupational licensing, utility and insurance regulation, and alcoholic beverage control.
10. Intergovernmental Relations, including interstate relations, state-federal relations, and local government structure and relations.

In addition to these fields of activity, the state legislature exercises the taxing power and important controls over the expenditure of state funds. It also plays an important role in the field of suffrage and elections.

Legislative Powers Relating to the Executive and Judiciary

The legislature's powers and relationships with the executive and judicial branches are subject to some variations from state to state, yet these entail additional legislative tasks. On the judicial side, for example, the legislature must constantly make judgments with regard to the constitutionality of measures before it in the light of current judicial interpretations. Important influences can be exercised over the executive or

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judiciary through such appointive or appointment-reviewing powers and impeachment authority as are assigned to the state legislature by the constitution. Probably the most significant legislative authority, particularly affecting the executive branch, is the power of the legislature through its committees to investigate any subject, department, or agency as may be necessary for the proper performance of its duties in order to determine compliance with either constitutional or statutory requirements.

Limitations Imposed on Legislative Action

Because of the low level of public esteem to which state legislatures fell in the late 19th and early 20th Centuries, legislative articles of state constitutions are predominantly limitations, restrictions and prohibitions which are imposed on that branch. Indeed, this trend has been carried as far as the development of devices whereby the people reserve the power to initiate as well as to review legislation thereby further delimiting or dividing legislative authority.

The problem of what restrictions on the exercise of legislative authority should be embodied in the state constitution raises an important question about the relation of the constitution to progress. If, on the one hand, the restrictions are highly specific and well defined, there is always the danger that they may rapidly become out-moded and develop into barriers

to necessary reform. This is well illustrated, for example, by state constitutional restrictions upon the power to tax. However, there are also difficulties attendant upon the effort to express limitations in broad and general terms. In the first place, it is the difficulty of uncertainty which leaves the legislative body more or less without guidance as to what it may or may not do. Secondly, it imposes upon the courts a heavy measure of responsibility in constructing the meaning of the restriction and determining whether or not any given legislative enactment violates it. This situation is well illustrated by the history of the so-called "due process" clause in both our state and federal constitutions. The use of broad, general limitations is perhaps the better constitutional practice. Unless a court develops and applies a dangerous theory that constitutional amendments represent an attack on the constitution and are accordingly to be opposed merely because they are amendments, the ultimate sovereignty of the people to make and amend the constitution can undo the effects of judicial decisions.

Limitations Against Special and Local Legislation

Abuses in the passage of special bills for individuals and corporations, and local bills applicable only to particular communities, have caused many constitution makers to specifically prohibit such practices or to set forth criteria which legislation must satisfy. Many states have gone to great extremes in

their constitutional provisions limiting legislative power. These restrictions are aimed at attaining uniformity of laws throughout the state and preventing legislators from exchanging courtesies for the passage of special laws for the benefit of a favored few. These restrictions fall into three categories:

1. Prohibitions against special, private, or local laws on any matters and in all situations which can be covered by general law.
2. Delineation in the constitution of subjects or situations which cannot be dealt with by special or local laws.
3. A requirement that all general laws be uniform in their operation throughout the state.
4. The establishment of a special procedure for notice before legislation affecting one locality may be considered by the legislature and for local referendum before the enactment takes effect.

Indeed even some of the newly revised state constitutions use several of the above devices to avoid special and local legislation. The New Jersey Constitution of 1947 specifically sets forth 14 subjects about which the legislature may not pass any private, special, or local laws.² In addition, this constitution provides that "No general law shall embrace any provision of a private, special, or local character;"³ and an additional requirement of special public notice prior to the enactment of private, special, and local laws.⁴ The Missouri Constitution

² Article IV, Section VII, para. 1, 9.

³ Art. IV, Sec. VII, para. 7.

⁴ Art. IV, Sec. VII, par. 8. See also Florida Constitution, Article III, Sec. 21.

of 1945 not only lists 29 subjects which shall not be enacted by local or special law, but makes the applicability of a general law a judicial question to be judicially determined.⁵ In addition the indirect enactment of local and special laws by the partial repeal of general laws is prohibited⁶ and a special public notice requirement is stipulated for pending local or special legislation.⁷ Even a brief examination of the listed subjects indicates that no modern legislature with average standards of integrity and decency would deal with them by special legislation, yet at one time or another these subjects have been dealt with by legislation in practically all states. However, as one authority on this subject observes:

"It may . . . be necessary to adopt special acts to meet emergency situations, to free communities from special acts passed years ago, and--in the absence of suitable administrative arrangements for the handling of claims--to make possible the payment of legitimate claims of citizens against the state. Legislatures ought to have power to meet such situations when they arise, and the public ought to have sufficient confidence in them to permit them to do so."⁸

A distinctive type of special legislation is local legislation or that which applies to any political subdivision or subdivisions of the state less than the whole. This field of legislative activity is characterized by great volume and often

⁵ Missouri Constitution, Art. III, Sec. 40.

⁶ Missouri Constitution, Art. III, Sec. 41.

⁷ Art. III, Sec. 421.

⁸ W. Brooke Graves, American State Government, 1953, p. 285.

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ludicrous evasions of constitutional prohibitions. In many states, as soon as constitutional limitations upon local legislation were adopted, the legislature promptly set up classes of local units, by the skillful manipulation of which constitutional restrictions might be evaded. Classification has been attempted on a subject-matter basis, a geographical basis, a population basis, a property valuation basis or combinations of these. Where the geographical basis is used and permitted by the courts, a law may be made applicable to any type of local unit.⁹ Through the use of combinations of factors, classification can be used to pinpoint the application of unwanted or special favor legislation to specific local units. In the so-called "Population-Bracket" bills in Texas, it is reported that more than a dozen different combinations of elements were used.¹⁰

In spite of attempts to curb local legislation, the quantity of it continues to constitute a significant portion of the total output in many states. There are, on the other hand, some

⁹ Ibid. p. 286. The author reports a case in which the Supreme Court of Pennsylvania vigorously invalidates an attempted classification: "This is classification run mad. Why not say all counties named Crawford with a population exceeding 60,000, that contains a city called Titusville, with a population over 8,000 and situated 27 miles from the county seat? or all counties with a population of over 60,000 watered by a certain river or bounded by a certain mountain? There can be no proper classification of cities or counties except by population. The moment we resort to geographical distinctions we enter the domain of special legislation, for the reason that such classification operates upon certain cities or counties to the perpetual exclusion of all others." Commonwealth v. Patton, 88 Pa. 258, 259 (1879).

¹⁰ Benton, Wilbourn E., "Population Brackets as a Method of Classification," Southwestern Social Science Quarterly, Sept. 1950, pp. 117-135.

situations which can be handled only by local laws. This may be good as well as bad. But as conditions change and the need for modification arises, local legislation tends to create more local legislation. The Model State Constitution deals with this problem with a rather unique set of requirements. Section 310 on Local and Special Legislation stipulates:

The legislature shall pass no special act in any case where a general act can be made applicable, and whether a general act can be made applicable shall be a matter for judicial determination. No local act shall take effect until approved by a majority of the qualified voters voting thereon in the district to be affected, except acts repealing local or special acts in effect before the adoption of this constitution and receiving a two-thirds vote of all the members of the legislature on the question of their repeal.

Qualifications, Election, and Tenure of Legislators

Ordinarily, one of the first considerations in devising a legislative article is that of the structure of the legislature. The alternatives of unicameralism and bicameralism are usually considered with their real and alleged strengths and weaknesses. Discussion of these alternatives is presented in Staff Paper No. X on Legislative Structure and Apportionment because of the close relationship existing between determinations as to the basis of legislative representation and the structure and size of the legislature. It is hoped that a grouping of these topics will facilitate determinations as to legislative structure and size which are best adjusted to give effect to the selected representation pattern, both at present and in the future.

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Qualifications

Constitutional requirements regarding age, residence, citizenship, and the barring of dual office holding are common in state constitutions to define the fundamental qualifications of legislators. Religious and property qualifications of early constitutions have gradually been eliminated and in general most states permit any person who is qualified to vote for the members of the state legislature to become a member himself. This would seem to be a reasonable and sufficient safeguard and would not restrict the field of qualified candidates. Yet as shown below many state constitutions elaborately define and restrict qualification for legislature membership despite the fact that the most significant qualifications of legislators are those which the voters apply at the polls.

Age Requirements. State constitutions are usually explicit regarding age qualification, stating either that a person shall have reached a certain age or that he shall be a duly qualified elector. Where there is an age qualification, most states do not have the same for members of both houses. Twenty-one years of age is most common for membership in the lower house.¹¹ Age qualification for membership in the upper house differs widely as shown by the following tabulation:

¹¹ Delaware, Kentucky, and Missouri specify 24 years; Arizona, Colorado, South Dakota, and Utah have an age qualification of 25 years.

<u>No. of States</u>	<u>Age Qualifications for Upper House Membership</u>
18	21
1	24
21	25
1	26
1	27
6	30

Citizenship and Residence Requirements. The citizenship requirement is present in all states and constitutions either specify that a person must be a citizen or a qualified elector in order to be a member of the legislature. Some constitutions further stipulate the period of citizenship which go as high as five years in the case of Maine. State citizenship for a certain period of time is occasionally specified.¹² Residence requirements in both the state and county for membership in the legislature exist in most constitutions, either expressly or by direct implication. These range from one to five years.

Election and Terms of Members

In all states legislative terms are either for two or four years. Short terms are the rule for members of lower houses. in 43 of the 47 states with two houses, House members serve for two years.¹³ Longer terms are generally provided for state senators: in 32 states they serve for four years; in 16 states

¹² Alabama and California have state citizenship requirements of three years; Georgia and New Jersey of four years for the upper house and two years for the lower house.

¹³ Only in Alabama, Louisiana, Maryland, and Mississippi do they have four-year terms.

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(including Nebraska) they serve for two. Legislatures in a quarter of the states in 1952-53 considered measures to lengthen legislative terms so as to increase the amount of time the legislator might devote to public business, to reduce the time consumed in running for re-election, and to retain experienced legislators longer. The proposed changes would have increased House terms from two to four years and Senate terms correspondingly, except in California, Illinois, Kentucky, and South Carolina, where Senate terms would have been increased from four to six years.

In setting the length of term for legislators a satisfactory balance should be sought between providing for legislative responsiveness to the ever-changing will of the people and a deliberative, experienced body of lawmakers. It would seem desirable to have the term long enough to permit a legislator to participate in two or more sessions, so that provisions governing sessions should be considered in determining the length of terms. There is really no important basis for the use of different terms for the two houses. This is largely due to the federal pattern and a device to attain some stability and to assure some experience in the legislative process. The objectives of stability and responsiveness might both be served by longer legislative terms and the election of a portion of each body biennially.

Ordinarily, state constitutions contain sections on the manner and time of electing legislators. Staff Paper No. X on Legislative Structure and Apportionment discusses problems and alternatives in determining the basis of representation which will affect the manner in which legislators are selected. Staff Paper No. IV on Suffrage and Election discusses the time and nature of the election process. Depending on the nature of provisions for elections decided upon in the Suffrage and Elections Article, the prescription of time of election of legislators could be made by reference to the elections article, or a stipulation for the regular election of some or all legislators in each odd or even year. The time of election requirement must of course be related to decisions about the time and nature of legislative sessions.

Judging Qualifications and Filling Vacancies

In one form or another state constitutions specify that each house is made the judge of the elections and qualifications of its own members. In case any controversy arises concerning the validity of an election to a seat in either house, or if any question is raised involving the qualifications of persons elected to either house, the house concerned may investigate and decide, usually by a majority vote, between rival claimants or the question of the eligibility of the person. The Model State Constitution, (Sec. 308) provides:

The legislature shall be judge of the election, returns and qualifications of its members and may by law vest in the courts the trial and determination of contested elections of members.

Provisions for filling vacancies in the legislature are of three general types: (1) election by popular vote at either a special or regular election; (2) appointment by the governor; and (3) action by some local governmental or partisan agency. Ideally, provision for a special local election to fill the vacancy would be preferred, but considerations of time and cost have, except in some of the more populous states, operated against this device. Hence a large number of states resort to gubernatorial appointments. Selection by some responsible and representative local agency has the merit of preserving action at the local level. The Model State Constitution sets forth a unique procedure; Section 305 provides:

Whenever a vacancy shall occur in the legislature, it shall be filled by a majority vote of the remaining members from the district in which said vacancy occurs, or in such other manner as may be provided by law. If, after thirty days following the occurrence of the vacancy, it remains unfilled, the governor shall appoint some eligible person for the unexpired term.

If some type of proportional representation is used, another available device is a recount of the ballots cast as the original election by the locality left unrepresented by the vacancy, thereby preventing a district majority from taking a vacated seat of a district minority.

Compensation of Legislators

There is general agreement that compensation of state legislators has been and in most states continues to be too low. In 27 states the salaries are fixed by the constitution, while in the remaining 21 states it is a matter for statutory action, although, in the latter case, provision is ordinarily made that such compensation may not be increased or decreased during the term for which the members have been elected. The two methods of payment employed are the per diem and lump sum. Eighteen states employ per diem payments which range from \$5.00¹⁴ to \$30.00.¹⁵ At present 31 states¹⁶ employ a lump sum or salary plan which range from \$200 in New Hampshire to \$10,000 (in Illinois and New York) per biennium. Most states provide additional compensation for attendance at special sessions. Allowances for travel expenses, usually on a mileage basis, and for miscellaneous expenses, such as postage and supplies, are normally provided in addition to basic pay or per diem payments. It is generally urged that legislative salaries should not be fixed by constitutional provision, but rather, the annual salaries should be fixed by statute at a level which will permit competent persons to serve in the legislature without financial sacrifice.

¹⁴ In Kansas, North Dakota, and Rhode Island.

¹⁵ In Louisiana.

¹⁶ Oklahoma uses a combination of daily pay and biennial salary.

The only limitation which might be considered, as recommended in the Model State Constitution is that compensation "shall neither be increased or diminished during the term for which they are elected." (Sec. 306)

Privileges and Immunities

The most important privileges commonly granted to legislators is freedom from arrest and freedom of accountability for words spoken in the course of the exercise of the legislative function. All but five state constitutions provide for immunity from arrest or civil process although silence on this matter would probably result in the allowance of this privilege under common law. About half of the state constitutions follow the precedent of the Federal Constitution (Art. I, Sec. 6) and grant immunity only during the session, and while going to and from the session. Other constitutional provisions are normally variations of this wherein specific time limits for immunity prior and subsequent to the session are set forth.¹⁷ Some states distinguish between immunity from arrest and immunity from civil process, making different provisions for the duration of these immunities.

¹⁷ Michigan, Mississippi, Missouri, Nebraska, and Utah specify 15 days before and after; South Carolina and West Virginia specify 10 days before and after; Rhode Island specifies two days before and after; and Texas, reflecting pre-automotive speeds, specifies one day for every 20 miles to be travelled.

Constitutional provisions granting immunity from accountability for words spoken in the course of exercising legislative functions applies to tribunals or courts other than the legislature. The Model State Constitution (Sec. 309) briefly specifies:

For any speech or debate in the legislature, the members shall not be questioned in any other place.

This provision is probably not as broad as immunity granted for "words uttered in the exercise of his legislative function."

To these privileges commonly guaranteed by the constitution there may be added numerous others under the provisions of the rules of the house. Of course these immunities do not preclude the legislature from disciplining a member for unbecoming conduct. Although legislative officers are not subject to impeachment, they may normally be expelled by a two-thirds vote of the house to which they belong; after expulsion they are subject to indictment and proceedings for any criminal offenses with which they may have been charged.

A prior criminal record does not normally bar a legislator from being seated unless the constitution details specific crimes or classes of crimes as making a person ineligible for membership in the state legislature. In this regard it is perhaps best to permit the electorate to express their judgment at the polls.

Dual Office Holding

Various arguments are advanced for prohibitions against dual office holding; however, they are all variations of the strict application of the separation of powers doctrine. Beyond this, the protection of legislation against improper motives of legislators and prevention of executive dominance through the manipulation of appointing powers have been advanced to justify absolute prohibitions of appointment of legislators to certain positions.

The subject of dual office holding can be divided into two parts: forbidden offices and incompatible offices. Forbidden offices are those for which a member of the legislature cannot qualify. These may be set forth in the constitution and normally refer to gubernatorial appointments or those of the legislature itself to a civil office of the state. Incompatible offices are those regarding which there is no prohibition or disqualification against acceptance, but the act of acceptance vacates the office first held.

It is wise to approach the determination of prohibitions against dual office holding by legislators with considerable caution. Once constitutional or statutory provisions are in effect, efforts of legislators to change them are frequently confused with supposed personal interest. Moreover, there is much to support the view of the state legislature as a good

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training ground for further public service. The extent of the prohibition can be determined only by weighing these advantages against the undermining influence on the legislative process of any suspicion of motives of personal gain by legislators.

Legislative Organization and Procedure

It is now necessary to examine the formal processes of the enactment of legislation in order to determine the advisability of providing constitutional guidelines or limitations regarding such questions as organization, rules, and procedures; the provision and selection of officers and supporting staff; the duration and frequency of legislative sessions and comparable practices which might have some effect on the quality and scope of legislation.

Sessions

The decision of the Convention on the frequency and duration of regular sessions of the legislature will affect its relationships with the executive branch as well as requirements for its own organization. Three questions arise in consideration of the matter of sessions: (1) Shall limited or unlimited, annual or biennial sessions be provided for? (2) Shall such sessions be split or continuous?; and (3) What provisions should be made for special sessions?

At present ten legislatures¹⁸ meet annually, a significant

¹⁸ Arizona, California, Colorado, Maryland, Massachusetts, Michigan, New Jersey, New York, Rhode Island, and South Carolina. In the states which are underscored, legislatures meeting in even-numbered years deal with the budget, revenue, and tax matters.

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change since 1943, when only four legislatures had annual sessions. The remaining 38 states hold biennial regular sessions, all but four (Kentucky, Louisiana, Mississippi, and Virginia) in the odd-numbered years. The trend toward annual sessions is continuing; in 1952-53 20 additional state legislatures considered this matter and four states initiated constitutional amendments to provide annual sessions.

Limitations on the length of regular sessions exist in 32 states. These range from 36 legislative days¹⁹ in Alabama to 150 calendar days in Connecticut and Missouri. Of the remaining 16 states which have no limit on the duration of regular session, five are states in which annual sessions are authorized.

The philosophy which favors biennial sessions leads also to constitutional limits on the duration of sessions. It is argued that the continued presence of annual legislatures unsettles large segments of the population, hampers administrative processes by legislating on details, does not concentrate legislators' attention on important proposals in a businesslike manner, and makes it difficult for competent but busy citizens to serve. All these arguments are sharply challenged today.

¹⁹ In California and Maryland, the sessions in even-numbered years, dealing with the budget, revenue and tax matters, are limited to 30 calendar days.

The operational requirements of state government, particularly the annual budget device through which the legislature may exercise effective control over administrative agencies, and the rapid pace of life and communal affairs demands a legislature that is in touch with the pulse of the state and has sufficient time to deal with a multitude and variety of problems. Indeed, the trend may well continue in the direction of providing that the legislature be "a continuous body during the biennium for which its members are elected," meeting "in regular sessions quarterly or as such times as may be prescribed by law."²⁰

Most state legislative sessions are continuous from the date of convening until adjournment. Six states²¹ utilize the device of the "split session" or "recess session" to enable legislators and the public to study pending proposals in greater leisure, to prevent the evil of last-minute introduction and passage of bills, to review executive vetoes, and for other purposes. The split session has not worked out very well in practice; it has resulted in the introduction of skeleton bills and created a pre-recess rush not dissimilar to the terminal rush it was intended to eliminate. Constituents are in fact rarely consulted during the interim and older and more experienced legislators are practically unanimous in desiring its abolition or amendment.

²⁰ Model State Constitution, Art. III, Sec. 307.

²¹ Alabama, California, Georgia, New Jersey, and Wisconsin. The Massachusetts legislature is constitutionally empowered to use this device but in practice its sessions are not split.

All states make provision for the calling of special sessions in addition to regular sessions. Usually the governor is authorized by constitution to summon the legislators in special session; in 30 states he is authorized further to specify the subject or subjects to be considered thereby prohibiting legislators from treating any other matter. Ten states²² also give the legislature the power to convene on its own initiative; in some of these states²³ a petition by two-thirds of the members of both houses is necessary and Georgia requires a three-fifths majority. It is not entirely clear in all of the states of this group whether or not the convening special session requires that it be called by the governor. Twenty-nine states do not limit the duration of the special sessions; among those states which restrict the length of sessions, the limits range from 15 days in Arkansas and New Hampshire to 70 days in Georgia.

Any provisions for special sessions will of course rest on decisions about the frequency of regular sessions. If biennial or limited sessions are prescribed, consideration should be given to permitting the legislature to determine the necessity of calling a special session, the length of the special session, and the limitation if any of the subjects which can be treated.

²² Arizona, Connecticut, Georgia, Louisiana, Massachusetts, Nebraska, New Hampshire, New Jersey, Virginia, West Virginia.

²³ Arizona, Louisiana, Nebraska, Virginia, and West Virginia.

Officers and Rules

All state constitutions contain provisions recognizing the power of the legislature to choose its own officers and to determine the rules of its own proceedings. The senate is denied the right to designate its permanent presiding officer in 37 states where the lieutenant governors assume that role. The major officers normally include a secretary or a chief clerk for each house who is charged with all clerical work and printing for the appointing chamber. These officers are normally chosen by vote of the members; minor officials and supporting staff are appointed by the elective officers, or, as in Wisconsin, under civil service rules. Supporting legislative staff is discussed below. The need for a provision granting the legislature the power to adopt rules is questionable because there is no way to make it act if rules are not adopted. Some states have attempted through constitutional provisions to insure the rapid organization of the legislature by denying per diem payments after a stated period until the legislature is finally organized.

Committees

Committee deliberations are frequently the most important part of the legislative process. The quantity and scope of legislative proposals requires legislatures to rely heavily upon their committees for detailed consideration of bills.

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Matters affecting the number of committees, their size, the method of appointment, and their procedures are left almost exclusively to legislative rules. The rare constitutional provisions which are expressly applicable to committees usually deal with the incurring of committee expenses or with committee consideration of bills. Eight states²⁴ require that all bills be referred to committee for consideration; Texas and Mississippi make the receipt of the committee's report a condition precedent to the adoption of the measure; and in Mississippi a report on each measure referred to a committee is required.²⁵

A few states have constitutional provisions for the withdrawal of bills from committees though this is normally incorporated in legislative rules. A Missouri constitutional provision (Art. III, Sec. 22) enables a one-third vote of elected legislators to withdraw a bill from committee.²⁶

Because of the importance of committee work in the conduct of investigations and in the formulation of legislation, there are two important considerations which some authorities argue

²⁴ Alabama, Colorado, Mississippi, Missouri, Montana, Pennsylvania, Texas, and Wyoming.

²⁵ The provision is easily evaded by reporting back on the last legislative day, thereby assuring the defeat of the measure.

²⁶ The Model State Constitution sets forth a similar provision in Article III, Sec. 312. Kentucky's Constitution (Sec. 46) and Michigan's Constitution (Art. V, Sec. 15) provide modified withdrawal procedures.

should be dealt with in a state constitution:

1. Should usual constitutional provisions requiring publicity and recording of legislative sessions be extended to committee proceedings?
2. Should the constitution prescribe advanced public notice of committee hearings which specify the subjects to be considered?

Dr. Frederic H. Guild urges the inclusion of both these provisions to avoid hasty or arbitrary committee action. Moreover he argues

"Sufficient notice of a committee hearing is as fundamental to due process of law-making as adequate notice or service in cases before the courts."²⁷

Quorum

Because of fear of rule by minorities many state constitutions set forth quorum requirements; in addition, consideration of certain subjects may require a quorum greater than that which normally must be present. All but four state constitutions²⁸ require a majority of all the members to constitute a

²⁷ Model State Constitution, National Municipal League, p. 29. These provisions are encompassed in Article III, Sec. 312: "The legislature may establish such committees as may be necessary for the efficient conduct of its business. Each committee shall keep a journal of its proceedings as a public record Notice of all committee hearings and a clear statement of all subjects to be considered at each hearing shall be published one week in advance in the journal."

²⁸ Indiana, Oregon, and Texas have a two-thirds quorum requirement. Tennessee requires "two-thirds of all the members to which each house" is entitled.

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quorum; in three states of this group the quorum is fixed at a majority of members elected.²⁹

Special quorum requirements are sometimes fixed for votes on final passage of bills or appropriation and revenue items³⁰ or for local bills.³¹ Adherence to accepted parliamentary rules in states where no special quorum requirements exist raises strong doubt about the need to include a quorum provision in the constitution.

Style Limitations

There are several formal limitations frequently imposed on the legislative process; it is difficult to determine how effectively, if at all, they have helped substantive legislation. The "one-subject rule" is found in 39 state constitutions. This rule requires that each law embrace but one subject which must be expressed in its title. The object of the provision is to prevent the inclusion of "sleepers" or "jokers" or in securing the passage of measures under the false color of its title as well as assuring separate consideration and decision. It is usually stated that the limitation had for its purpose the prevention of logrolling, or the giving of notice of the contents of the bill, or both. In practice, logrolling is not prevented and notice is unimportant. The great quantity of

²⁹ Maryland, Missouri, and Ohio.

³⁰ Wisconsin Constitution, Art. VIII, Sec. 8.

³¹ New York Constitution, Art. III, Sec. 20.

legislation produced by this requirement and the obstacle it has presented in some places against the codification of state laws or the enactment of comprehensive codes makes the inclusion of this provision highly questionable.

Other style limitations deal with the revival, amendment, and incorporation of laws by reference. The evil to be remedied is a narrow one. It has to do with drafting a reviving or amending act in such a way that one has no idea what the act is really attempting to do. The typical situation to be prevented is one in which certain words on a certain line and page of a previous act are to be stricken, or words added, or both. The limitation does not normally extend to repealing an act by title only. In jurisdictions where the courts keep the limitation down to narrow and sensible limits, it has probably avoided legislators from being misled without hampering legislation.

Another style requirement commonly specified in state constitutions³² is the stipulation of an enacting clause. This is a purely formal requirement, the terminology of which may vary. This matter can be amply provided for in legislative rules.

Procedural Limitations

Constitutional provisions regarding the house into which legislation may be introduced exist in 41 states; of these 21

³² Except Delaware, Georgia, and Virginia.

states require that revenue and money bills originate in the lower house, a carry-over from the old notion that taxation must have a basis of popular representation. The other 20 states permit legislation to be introduced in either house and 6 state constitutions are silent on this matter. The limitation on introduction has proven troublesome, particularly in cases where bills having incidental revenue features are introduced in the senate and then must contend with the constitutional rule.

In attempting to extend the time of consideration of bills and to avoid the last-minute legislative rush, several states, through their constitutions, have undertaken to force the early introduction of bills. These limitations take several forms: an absolute prohibition against introduction during the last part of the session, as the last three days,³³ or of specific types of bills.³⁴ Most states attempt to deal with this problem through legislative rules. The pressures brought upon members make it difficult for them to avoid waiving the rules. Similarly, constitutional provisions are evaded by such devices as the "skeleton" bill and the "hijacking" of another member's dead bill. To enforce any effective time limit on the introduction of bills, provision must be made for pre-session bill

³³ Arkansas and Mississippi.

³⁴ For example, appropriation bills in North Dakota cannot be introduced after the 40th day except by unanimous consent.

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drafting which is now provided in 35 states as well as pre-session filing in effect in five states. The experience of other states would cast grave doubt as to the advisability of touching upon bill introduction limitations in the constitution.

The requirement of the repeated reading of bills aloud before legislatures is in the constitutions of more than half the states--even though it was originally needed only because many legislators could not read and because duplication methods were too slow to permit personal use and inspection of bills. Thirteen states make no provision in their constitutions for reading of bills, but provide for them by rule.³⁵ The treatment of this subject through rules would be preferable to meaningless compliance with or evasion of an anachronistic procedural requirement in the constitution.

Requirements for final passage of a law are sometimes formalized in state constitutions, frequently stipulating stricter requisites for adopting specific types of legislation.³⁶ This may be applied, for example, to bills increasing the public debt or acts going into effect immediately as urgency measures in states where a fixed time must ordinarily elapse before laws become effective. Of the 36 state constitutions which specify

³⁵ Connecticut, Delaware, Iowa, Massachusetts, Montana, New Hampshire, New York, Vermont, Washington, Wisconsin, and Wyoming require three readings; Maine and Rhode Island require two.

³⁶ For a complete Tabulation of practices in all 48 states with regard to passage majority requirements and roll call and reading requirements see Book of the States 1954-55, p. 109.

the requisite majority for final passage, the greatest number have adopted the requirement of a majority of members elected. Four states with constitutional provisions regarding final passage and 10 states with no constitutional provisions on this point follow a requirement of a majority of members present and voting.³⁷ Indeed, the nature of final passage requirements bear no relationship to whether they are prescribed by rule or constitutional provision. Except for the desire to make it more difficult to pass legislation on prescribed subjects or to meet special emergencies, it would be reasonable to rely upon established parliamentary practices for the final passage of laws. Indeed more stringent majority requirements for special subject matter or emergency legislation may operate as positive obstacles to meet emergencies or special needs.

If the Alaska Constitution makes provision for executive veto,³⁸ it will be necessary to consider the nature of legislative action after veto in the reconsideration or repassage of the vetoed item or bill. As shown in the following tabulation 24 of the 47 states in which veto powers are given to the governor, a majority of two-thirds of the elected members of each

³⁷ Two other states have no constitutional provision governing final passage: by rule West Virginia has adopted the standard of all members elected and New Hampshire requires more than a simple majority when the quorum falls below a prescribed number.

³⁸ Veto powers are discussed in Staff Paper No. VI on The Executive Department.

house are required to override the veto.³⁹ This makes the veto a very powerful legislative factor and draws a sharp distinction between enactment and repassage processes. Indeed, where a legislative majority similar to initial passage is required for repassage after veto, the governor's action amounts to little more than an advisory statement requiring legislative reconsideration. The 47 states providing for a governor's veto are distributed as follows in the requirements to override:⁴⁰

Two-thirds of members elected . . .	24 states
Two-thirds of members present . . .	11 states
Three-fifths of members elected . . .	4 states
Three-fifths of members present . . .	1 state
Majority of members elected . . .	6 states
Majority of members present . . .	1 state

In the absence of constitutional or statutory provisions, laws take effect immediately upon the completion of the prescribed enactment procedure. In the 27 states where constitutional provisions exist, the most common is to provide for the elapsing of a stipulated period of time, usually 90 days, after the date of passage or of adjournment.

Legislative Services

A major legislative development during the past 50 years has been the creation and expansion of various types of permanent staff agencies to provide state legislators with needed assistance. The number and complexity of legislative problems and

³⁹ This is also the repassage requirement in Alaska.

⁴⁰ Source: Book of the States, 1954-55, p. 103.

the rapidly mounting costs of state government have led to certain institutional forms in such areas of assistance as:

1. Drafting of legislation.
2. Statutory, code, and law revision.
3. Post-audit of state fiscal operations.
4. Pre-session review of the budget.
5. Reference and research assistance on any subject of legislation. Related to this service but more comprehensive in nature is the conduct of advance studies in important subjects expected to come before future legislative sessions and the development of recommendations for legislative action.

The oldest of the permanent service agencies are legislative reference libraries, now established in more than 40 states. Wisconsin established the first integrated agency to provide more comprehensive services for legislators in 1901 and by 1917 more than half the states followed this lead. The reference agencies represent a great variety in services provided and organizational structure. A majority are sections of the state library, state law library, or department of library and archives. Where bill-drafting is a major activity in addition to reference services the bureau is usually independent of the library.

During the past 20 years the expansion of the legislative council idea to more than two-thirds of the states has followed the council in Kansas established in 1933. Legislative councils, staffed with competent research assistants, provide for

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two long-felt needs: they provide machinery for effective and continuing legislative participation in forming policy; and they provide means by which legislatures can obtain a sound factual basis for deliberations and decisions. As in Alaska, most of the legislative council laws adopted since 1943 provide for coordinating the legislative council and legislative reference functions and activities.

Other significant developments include law revision commissions to carry on systematic studies of substantive law revision and the creation of specialized staff facilities under legislative supervision to provide continuous review of state revenues and expenditures and pre-session analysis of the budget. The latter development has received criticism from various quarters, including the governors of several states.

The trend during the past generation in establishing permanent and continuing legislative research agencies has been strong.⁴¹ Many states, however, still make extensive use of specially-created interim study committees and commissions.

The Model State Constitution (Article III) goes so far as to include provisions setting forth the nature, organization, duties, and compensation of a legislative council, and permits the delegation of authority to the legislative council to

⁴¹ For a summary of permanent state legislative service agencies, see Book of the States, 1954-55, Table 1, pp. 122-127.

approve or disapprove general orders, rules and regulations of state officers, departments, offices, and agencies which are necessary to supplement existing legislation. The inclusion of these provisions seems improper on several counts:

1. Because of the variety and scope of existing and unknown future legislative needs for supporting research and other assistance, it is not desirable to fix the structure, duties, and other details of a legislative council in the constitution. Admittedly, the legislative council device is desirable and necessary--but it is not the only possible pattern of providing legislative supporting services and like similarly modern and sound ideas on the internal organization and administration of the court system, department of finance, or the governor's office, it does not require constitutional reference or elaboration.
2. The delegation of power to the legislative council to approve or disapprove general orders, rules, and other actions carried out by executive or administrative agencies raises several potential dangers:
 - a. Interference, uncertainty, and confusion in executive services.
 - b. A tendency on the part of the legislature to fail to provide sound legislative guides and standards for the conduct of executive programs which require rule-making authority and limited discretion for successful attainment of legislative objectives because of reliance on the council's "watchdog" role.

Lobbying

A special problem is raised by the nature of relationships which develop between legislators and special interest groups or their representatives. In one sense, a lobbyist is a legislative service agency in that he often makes available to the legislature information and material to attain or defeat legislative action. Fearing an unbalanced influence of small, financially strong, special interest groups on legislators 20 states include provisions against lobbying or corrupt solicitation in their constitutions. In another 12 states the regulation of lobbying is based on statutory law. The most common methods employed are the registration of lobbyists and the filing of expense statements by lobbyists. Other types of regulation include the restriction of appearances to committee meetings or to public addresses and newspaper publications; the filing and publication of statements or briefs by lobbyists prior to presentation before the legislature or its committees; and the prohibition against the employment of lobbyists on a contingency fee arrangement, where compensation is based on the success or failure in obtaining desired legislative action. Most observers believe that existing state regulation of lobbying is ineffective, and ascribe this to lax enforcement and to the failure of legislatures to deal vigorously with lobbyists, having enacted only sufficient regulation to satisfy public opinion.⁴²

⁴² For a summary of the regulation of lobbying by the states, see Book of the States, 1954-55, pp. 132-133.

The most effective defense against corrupt and unbalanced lobbying is a legislature that is able to perform its work efficiently, without unnecessary delays, and upon the basis of sound information and data derived from a wide variety of interests as well as its own supporting research staff. Legislatures which are hamstrung by archaic restrictions and procedures, poorly organized, or unrepresentative are the ideal breeding grounds for bribery, corruption, and the disproportionate influence of small selfish interests over those of the people of the state.

General Comments

In drafting the legislative article, delegates will have to arrive at a basic political decision: To what extent are legislative representatives to be permitted to exercise the sovereign powers of the people? This question is partially answered by the traditional allocation of powers between the Federal and state governments and judicial interpretations of them, so that the state legislature becomes partially limited in exercising powers by the act of statehood. Then too, the principle of the separation of powers, which will undoubtedly find its way into the Alaska Constitution, serves as a second substantial limitation on the legislature's sphere of action. As far back as the Founding Fathers the greater potentiality of the legislative branch to interfere with and usurp powers

of the other departments was realized by virtue of their dependence upon the legislature and the indirect and devious means at its disposal in the conduct of the legislative process. Hence, the relationships between the three branches must be carefully defined and correlated in the legislative, executive, and judicial articles. The Alaska Bill of Rights will put further limitations on the legislature in its relationships with individual as well as property rights. Thus, even before we start to consider the legislature and legislative process per se, we find this body encased from above by federal powers and safeguards, on two sides by the executive and judiciary, and from below by individual and property liberties and rights. Yet, from our examination of the current provisions for American state legislatures, we find an alarming array of further limitations, restrictions, and ritualistic requirements imposed on this body of already limited powers. Somehow the legislature still retained access to the people's purse, an oversight quickly rectified in many states by elaborate limitations on the rate at which the purse's contents could be tapped by setting rigid tax and debt limits in the constitution. Notwithstanding, the legislature could still decide, within rather broad limits, how the public money was to be spent. This oversight was rather effectively taken care of in many states by the dedication of revenue, which has been carried in some states as far as 75 to

90 per cent of the state's revenues. This device, initiated as a safeguard to provide financial underpinnings for programs which legislators were not trusted to provide, soon became something of a legislative opiate. The legislators soon discovered that it was far easier to obtain additional taxes by "bargaining" with certain groups to provide specific, usually benefitting, services for them with "their" money. Hence, shortsighted or overly-cautious legislators have carried this practice further, thereby further abdicating their powers and responsibilities.

The general conduct of the states regarding the control of legislative tenure, organization, and procedure is equally restrictive. Common restrictions include when the legislature shall meet, for how long it shall meet, and with respect to special sessions, what it shall consider. Who shall be eligible for membership in terms of age, residence, and background is usually stipulated. At the same time strictly defined requirements and limitations are prescribed for legislative procedure and style. Indeed, one can conclude that the cumulative or average approach to legislative articles in state constitutions has been premised on a presumption of mischief, corruption, or stupidity without realizing that each safeguard in some manner, great or small, also reduces the legislature's power to act for the common good. The approach urged upon Alaskan delegates

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for use in the formulation of this and other articles is to seek out the greater good rather than the lesser evil.

With respect to limitations on style and procedure, Ernst Freund observed almost 40 years ago that while style requirements have had some "beneficial effects upon legislative practice" on the reverse side "they have given rise to an enormous amount of litigation; they have led to the nullification of beneficial statutes; they embarrass draftsmen, and through an excess of caution they induce undesirable practices, especially in the prolixity of titles, the latter again multiplying the risks of defect." Freund goes on to say:

"The sound policy of constitution making is to impose procedural requirements only under the following conditions: (1) that they serve an object of vital importance; (2) that they can be complied with without unduly impeding business; (3) that they are not susceptible of evasion by purely formal compliance or by false journal entries; (4) that they do not raise difficult questions of construction; (5) that the fact of compliance or non-compliance can be readily ascertained by an inspection of the journal. The application of these tests would lead to the discarding of most of the existing provisions without any detriment to legislation, as is proved by the experience of states which never adopted them."⁴³

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⁴³ Freund, Ernst, Standards of American Legislation. University of Chicago Press, 1917, pp. 154 ff.

VI

THE EXECUTIVE DEPARTMENT

A staff paper prepared by Public Administration
Service for the Delegates to the Alaska
Constitutional Convention

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THE EXECUTIVE DEPARTMENT

Alexander Hamilton admonished in The Federalist that "Energy in the Executive is a leading character in the definition of good government The ingredients which constitute energy in the Executive are, first, unity; secondly, duration; thirdly, an adequate provision for its support; fourthly, competent powers." In the teeth of this advice, early state constitutions seemed intent on the neutralization of the executive; indeed a practice which in its pathetic extreme was typified by the remark of William Cooper when he returned home from the North Carolina Convention and was asked how much power they had given the governor, he answered: "Just enough to sign the receipt for his salary."¹ In view of the fact that early state governors were essentially successors of strong governors who were appointed by the Crown or proprietors and who often exercised supreme judicial and absolute veto powers, the popular repugnance to executive authority was perhaps a natural expectation. For more than a century after 1776 the erosion of the executive power continued under the tides of popular distrust,

¹ Reported by Leslie Lipson in his book, The American Governor From Figurehead to Leader, (Chicago, 1939) p. 14.

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legislative jealousy, and laissez faire interests. The executive had been contained--he was too weak to tyrannize, but he was not strong enough to serve. It was not until the Twentieth Century that a new premise became apparent. Some constitutional conventions began to realize that democracy requires institutions that are strong enough to govern. Inside the executive branch this principle was applied by enhancing the political power of the governor and making him a chief executive in fact as well as in name, thus completing a cycle back to Hamilton's initial "ingredients of energy in the Executive" of "unity", "duration", adequate "support", and "competent powers".

Alaska, in relinquishing territorial status, finds itself in a position somewhat comparable to that of the original states in the transition from a governor appointed by superior political power to a locally chosen one. In providing for the chief executive of the State of Alaska, the Delegates must make basic determinations about the nature and scope of powers and responsibilities to be given him. The political history of the American states is rich in ingenious devices and errors in fashioning executive powers. Today, the question is not so much one as to whether the governor should be a weak or strong one, but what combination of powers and limitations should be arrived at to enable him to direct and execute state programs. This task can be approached as the containment of real or imagined mischief

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or as the release of power and capacity to serve the public good. Experience has shown the folly of the exclusive use of the former premise.

The Governorship

There are certain traditional patterns that have been adopted by the American states despite variations in details. All states have as their chief executive a popularly elected governor whose term is either two or four years. The governor's executive duties are customarily to oversee the faithful execution of the laws; to grant pardons, commutations, and reprieves, normally excepting treason and impeachment cases; to serve as commander-in-chief of the militia and to grant commissions in the name of the state; and to represent the state in its dealings with other states and with the federal government. In his relations with the legislature, the governor generally reports on the condition of the state and recommends desirable legislation, signs or disapproves of measures passed by the legislature, and may adjourn the legislature when the two houses cannot agree upon adjournment. Normally the governor is empowered to convene the legislature for special sessions whenever he deems this necessary. The powers and duties of the governor as chief administrator of the state are subject to wide variations which will be commented upon in the course of this paper.

Qualifications

Presumably to assure maturity, sufficient concern with and interest in the affairs of the state, and in many cases to exclude naturalized or new residents, many state constitutions provide qualification requirements of minimum age, citizenship, and residence. Almost two-thirds of the states require a minimum age of 30 years.² United States citizenship is also required in two-thirds of the states, some states stipulating the duration of this citizenship which ranges from 5 to 20 years prior to candidacy. About one-half of the states also stipulate state residence requirements which range from one to ten years. About one-third of the states also prohibit the governor from holding another office in the state, a federal office, and a position under a foreign power or another state.

In all states the governor is elected by popular vote. In most states the candidate receiving the highest number of votes is elected, even if that is less than the majority of the total vote. Under the two-party system, plurality elections usually give the same results as a majority requirement. But with three or more candidates, the election might go to one receiving less than an absolute majority, and a few states have special provisions for such a contingency.³

² Eight states allow a qualified elector thereby setting the minimum age at 21; four states require 25 years of age; and Oklahoma requires a minimum of 31 years.

³ In Maine, Massachusetts, New Hampshire, and Georgia an absolute majority is required; and if no candidate receives this majority, the election is decided by the legislature on joint ballot. The Mississippi Constitution has a peculiar provision for the election of the governor under which a majority of both the popular vote and electoral votes assigned to counties or legislative districts is required.

Terms and Succession

Governors are now elected in most states for a term of two or four years, about half of the states in each class. The states have been following a desirable tendency to lengthen the governor's term to four years.⁴ It is generally considered advisable to provide a four-year period during which the governor has an opportunity to develop his policy leadership out of his experience. However, in 16 of the four-year term states, constitutions prohibit a second consecutive term.⁵ Under this arrangement the influence of the governor tends to decline as the term progresses. It has become increasingly apparent that if the governor is to have at least one term of full political power, he must not be prohibited from succeeding himself. In a broader sense, such limitations contain the potential of depriving the people of the state from endorsing by reelection an acceptable and experienced man who has substantially but not totally executed desirable programs and services.

In fifteen states which elect governors on a quadrennial basis gubernatorial elections do not coincide with presidential

⁴ Within recent years Connecticut, Idaho, and New Jersey have adopted the four year term, bringing the total to 29 states. In addition, both the Hawaii and Puerto Rico constitutions provide for a four year term, as does the Model State Constitution.

⁵ In eight states two successive terms are permitted or the governor is permitted to serve only a specified number of years during a prescribed period. No limitation upon succession exists in 29 states.

elections. This is intended to permit the focus of attention on state issues; but unfortunately, because of the relatively greater popular interest in presidential elections, frequently a fewer number of votes are cast in the gubernatorial contests.

Compensation

Mention of a specific salary for the governor is made in only six state constitutions; in two of these the constitutional provision is essentially a stipulation as to the governor's maximum pay which the salary-fixing authority of the legislature cannot exceed. The establishment of the governor's salary is properly a legislative rather than a constitutional determination. In order to protect the executive from unreasonable domination by the legislature, the constitution probably should contain a provision that no legislature may reduce the salary of the incumbent governor.

Vacancies

All state constitutions include a provision for establishing succession in case of vacancy in the office of the governor by reason of death, resignation, impeachment, or other cause. The most common provision, obtaining in 37 states, names a lieutenant governor as the first successor to the office of the governor.⁶ In the states without a lieutenant governor, eight provide for succession by the president of the senate and three

⁶ In 35 of these states the lieutenant governor also acts as president of the senate.

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states designate the secretary of state. Thus in the typical state, the first successor would be the lieutenant governor, followed by the presiding officer of the senate. The secretary of state and speaker of the house are the others who figure prominently in the line of succession.⁷ The provisions of the New Jersey Constitution seem to cover all contingencies: no lieutenant governor is provided but succession is traced to the president of the senate, then to the speaker of the house, after which succession may be provided by law. In the event of a vacancy, provision is made for the election of a governor at the next general election to serve during the unexpired term. If the governor does not perform his duties through inability or other reason, the legislature upon two-thirds vote in each house may appeal to the state supreme court to declare the office vacant. (Art. V, Sec. I)

Impeachment and Recall

All the state constitutions except that of Oregon provide for impeachment proceedings for removal from the office of the governor and other executive officers, and a fourth of the states provide for his recall. In nearly all states impeachment charges are brought by the house and tried by the senate. In several states provision is made for the referral of the case to the state supreme court or the sitting of the court with one of

⁷ Twenty states name three successors; five states go beyond this number, Washington being the highest with seven named successors.

the chambers. In some states no specific grounds for impeachment are stated; but in most states high crimes, misdemeanors and malfeasance in office are named. In most states a majority vote of the house of representatives is sufficient to impeach, but in some states a two-thirds vote is required. For conviction a two-thirds vote of the senate is the usual provision.

Recall is discussed in Staff Paper No. XII on Initiative, Referendum, and Recall. Impeachment and recall are cumbersome methods, which can be used only in aggravated cases; and even when attempted, they are seldom effective. The Model State Constitution includes a provision for the removal of the governor by a two-thirds vote of all members elected to the legislature without the formalities of impeachment proceedings. The legislature has the related necessary power of convening on its own initiative.

The Governor as Chief Executive

All of the recently drafted and many of the older constitutions contain a provision vesting the executive authority of the state or commonwealth in the governor. In order to give meaning to this vesting of authority and responsibility, the constitution should:

1. Refrain from specifically creating any executive departments or positions except that of the governor.

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2. Provide that any executive departments thereafter created by law shall be responsible to and subject to the direction of the governor.
3. Vest in the governor the power to appoint department heads to serve at his pleasure.

Item 1, above, meets squarely the problem of constitutionally created departments, such as exist in many states, and which hamstring efforts at reorganization to achieve greater efficiency or to meet modern administrative needs. It also results in the "short" ballot, with only the governor to be elected, a desirable feature that meets almost universal approval.

Some recent constitutions, while not specifying organization of the executive branch, include a limitation on the number of executive departments (e.g., 20 in New Jersey and Hawaii) there seems to be no magic number (is 20 better than 18 or 22?) and discretion on this point is better left to the legislature.

The second item above provides for unity in the executive branch and for the ultimate responsibility of the governor.

The third item, assigning the governor full appointive and removal power, carries to a rational climax the objectives set by the first two items. It will be contended by many that the governor's appointment and removal power should be subject to confirmation in each case by the legislature or by at least the upper house thereof. Recurring experiences in many states, however, including those with recently adopted constitutions,

indicate that requirements for legislative or senate confirmation can lead to confusion and delay, can serve to dilute the separation of powers doctrine, and can encourage undesirable politicking of administrative department heads.

Provisions of Other States

In most other states the governor does not have the unlimited discretion in appointments recommended here.⁸ Concurrence of one or even both houses of the legislature often is required. Occasionally he must make his selections from panels submitted by interest groups or professional organizations. Although the theory of concentration of authority and responsibility in the governor would dictate that when officials are chosen by him, they should serve at his pleasure, the governor does not have such unlimited power of removal in most states. Most constitutions are extremely vague on the subject, a situation which has often led to controversy and legal action. The most liberal in this respect is the Missouri Constitution of 1945; Article IV, Sec. 17 says that "all appointive officers may be removed by the governor." In the New Jersey Constitution the governor may remove single department heads, all of whom he appoints, but plural departments heads "may be removed in the manner provided by law" (Art. V, Sec. 4).

⁸ For a summary of the appointing powers of state governors, see Book of the States 1954-55, pp. 159-161.

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In the absence of a general removal power over his appointees the governor's authority of removal, if any, depends upon the statutes under which the various agencies are established. These provisions vary widely from state to state and from agency to agency.⁹ A number of states through administrative reorganization statutes are providing the chief executive with greater appointive and removal discretion. Kentucky and Pennsylvania are notable examples.

In summary, it may be noted that only two states give the governor broad removal powers. In the remainder he must "show cause", a difficult course of removal which adds little to the governor's real authority over his appointees, since administrative incompetence and obstructionism are difficult charges to prove. The limited removal power of the governor is one of the chief causes of his inability to control state administration. Lacking any effective means of getting rid of inefficient or disloyal subordinates, he must necessarily accept their half-hearted service.

The conclusion seems justified that the governor's lack of clear authority over administrative officials is a serious

⁹ Reorganizing State Government, Council of State Governments, (Chicago, 1950) reports on page 26: "Brief inspection of the statutes of several states indicates that somewhat less than half (perhaps about 30%) of the appointive officers and commissioners in the states serve at the governor's pleasure. These are usually the minor officers. The rest serve for specific terms. About half of the specific-term officers may be removed "for cause," and for the rest no provision at all is made for removal.

impediment to effective administration and unity of management. As one observer commented upon the administrative limitations imposed on the governor of his state: ". . . his duties . . . seem more like those of an observer than of a chief executive."

Convention Considerations Regarding Executive Branch

In the Convention at College there will undoubtedly be considerable and sustained pressure to set aside a particular agency from the governor's control (and thus, it is claimed, to free it from "politics"); to designate an agency or a function which will not only be free from gubernatorial direction but also from legislative policy control through the device of constitutionally dedicated revenues; or to insist that legislative control demands that, in addition to legislation, appropriations, and legislative audit, such control demands appointment confirmation.

The proponents of such measures should be reminded that other and more adequate safeguards of the expression of popular and legislative intent are available, including in addition to those already mentioned, the responsibility and accountability of political parties; that arguments for separate and special treatment of education, or fisheries, or veterans, or any other function, subject, or group applies equally to all governmental responsibilities; and that the virtues of a constitution restricted to basic law and favoring no group or interest over

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any other are overwhelming and in the case of a potential new state, the only wise and practical course.

Pressure for constitutionally embedded fragmentation of the state executive branch exists in many states and derives from many sources, of which the following were reported by the American Assembly in 1955:¹⁰

1. The "normal" drive for agency autonomy or an almost innate characteristic of administrative agencies to desire independence.
2. A historical background of separate responsibility to the electorate which may have had its origin in a "reform" movement for a special function or as a popular repugnance against a scandal in an established service. The appeal of "direct responsibility to the people" is difficult to overcome.
3. The attitude of clientele and interest groups and the often closely related and mutually reinforcing factor of professionalism. Each interest group, identifying the public interest with its own, feels that its affairs are properly considered by keeping the agency and funds involved "independent"--meaning independent of everyone but the particular interest concerned. The politics of the ballot-box are substituted by the politics of special influence, often but not always with the highest motives. Professionalization, as a force for fragmentation of state services, is often closely linked to the pressures of special clientele groups.
4. Functional links to the national government, or the tendency of a lower level of government to adjust its organization to mirror the larger political unit. This tendency is probably most strongly felt at the state level as the result of Federal grant-in-aid programs and requirements.

¹⁰ The Forty Eight States: Their Tasks as Policy Makers and Administrators, The American Assembly, Columbia University, 1955, pp. 115-118.

5. The desire to insulate special types of programs or the belief that certain kinds of programs should be in some measure removed from political policy and processes. Regulatory, experimental, and trade promotional agencies have often been provided with insulation or exemption from central controls and policies.
6. Political division between the governor and the legislature has frequently expressed itself in the establishment of administrative agencies which were placed under legislative control or, as a minimum, beyond any effective control of the governor.

The Delegates at College need to be aware of these possible risks to an orderly and responsible executive department. Theirs is the challenge and opportunity to excel any constitutional draft to date on this point.

The Governor's Relations with the Legislature

In contrast to the divergent position of the governor among the American states as chief administrator, his relations to the legislature are found to be somewhat more uniform. Indeed in many states the governor's powers over legislation are more comprehensive than his control over executive administration. This is largely attributable to the historical need on the part of early American constitution drafters to reconcile the separation of powers doctrine with the British parliamentary practice in which the executive played a continuing part in the legislative process and was drawn from legislative ranks. In very early American state constitutions, the legislatures appointed or elected governors; but as the practice of popularly elected

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governors gained ground, the likelihood of friction or open conflict between the governor and the legislature increased. Hence executive-legislative relations stand today among some of the more important basic political problems of our entire system of American government. In the traditional pattern of state government the governor exercises influence over the legislative process in three basic ways:

1. As an initiator of legislation through messages, reports, and the executive budget.
2. The power to call special sessions and often to prescribe the subjects to be discussed at them, as well as the power to adjourn sessions under certain circumstances.
3. Through the exercise of the veto power.

The Introduction of Legislation

The governor normally has no control over the composition and election of the legislature, except in some instances where he is given power to call special elections to fill vacancies. The time for the beginning of legislative sessions is usually prescribed; and the time of adjournment is usually fixed by the legislature itself unless there is a constitutionally specified duration which it cannot exceed. But, if within this time, the legislature cannot agree on adjournment, the governor is often given power to adjourn the session. Typically, the governor has power to call special sessions and is usually given power to change the place of meeting in case of danger from

disease or the presence of an enemy. At special sessions the governor's influence on legislation is strengthened. In about half of the states, legislation at such sessions is limited to the subjects named by the governor; and in any case, attention is concentrated on the subjects so stipulated.

It is normally made a constitutional duty of the governor to give the legislature information as to the condition of the state and to recommend such measures as he deems expedient and necessary. This is usually done by means of oral or written messages at the beginning of each regular and special session, and by messages from time to time on particular subjects. The governor's recommendations to the legislature do not constitute formal introduction of the measures, but bills will usually be introduced on the subjects proposed. Increasingly, provisions for the submittal of an executive budget specify or imply the accompaniment of necessary draft legislation to provide for the legal and financial bases of the budget program.

The Veto Power

At the final stage of legislation the governor has an important negative voice, in the power of disapproving a bill passed by the legislature. In three-fourths of the states bills disapproved by the governor become law only if passed by two-thirds of each house--in most cases two-thirds of all the elected members. The scope of the veto power varies in the

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several states: in half the states it is authorized only for legislative bills; in the other states joint resolutions are included; and in most of them also other votes and orders of both houses, but usually with certain exceptions such as resolutions of adjournment and questions of procedure. In a few states proposed constitutional amendments are expressly excepted; and many courts have held that such proposals are not subject to the governor's action, even if not specifically excepted.

In three-fourths of the states the governor's veto power has been further increased by authorizing him to disapprove separate items in appropriation bills; and in some states this has been construed to authorize the reduction of items. The item veto has been broadened in a few states where the governor may veto any section of a bill as well as the emergency clause of a bill if one is provided. The governor can also be specifically authorized to propose amendments to bills.

The time given the governor for the consideration of bills varies rather widely. During the legislative session, the time given to the governor to consider bills is only three days in about one-fifth of the states; it is five or six days in slightly more than half the states; and ten days in the remaining one-fourth of the states, the latter group including most of the larger states. After the adjournment of the session, about three-fourths of the state constitutions provide for a

definite period to act on a bill which range from three days in Minnesota to 30 days in seven states. The New Jersey Constitution of 1947 gives the governor 10 days to consider bills while the legislature is in session and 45 days after an adjournment sine die. The pocket veto is eliminated by a provision that if the governor vetoes a bill after adjournment, the legislature reconvenes in special session to reconsider the bill and any amendments which the governor cares to offer. If the bill is amended and reenacted, the governor has ten more days in which to consider, but no bill may be returned a second time. The same provisions apply to the item veto. This procedure has several desirable characteristics in that it is designed to carry through to enactment legislation surrounding which there may be considerable executive-legislative disagreement. By the elimination of the pocket veto, the governor is forced to take a public stand for or against each bill. He cannot evade his responsibility nor can the legislature which must consider all vetoes.

The Governor's Other Specific Powers

In addition to his general authority as chief executive and his powers in relation to the legislature, state constitutions confer certain other specific powers on the governors. These include the power to grant pardons to persons convicted of crimes and to act as commander-in-chief of the state military forces. In addition he exercises authority in the conduct

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of external relations which stems from provisions of the U. S. Constitution, legislative enactments, or the governor's own initiative.

Pardoning Power

All but three states give the governor the power, with various limitations, to pardon after conviction. The most common constitutional provision provides that pardons may be granted only after conviction, and except impeachment cases; while many constitutions also except cases of treason, and Vermont further excepts murder cases. Over a third of the governors must share the power to pardon with some other agency, such as a board, an executive council, or in the case of two states the governor may pardon only with the advice and consent of the senate. The general power of pardon may be exercised so as to grant absolute, limited or conditional pardons.

A number of state constitutions have express provisions as to reprieves, commutations, and the remission of fines and forfeitures. The powers of reprieve and of commutation usually except impeachment and treason cases, and in a limited number of states there are specific procedural requirements or these powers are subject to regulation by law. The power to remit fines and forfeitures is not so commonly vested by constitutions as is executive clemency. About a third of the states give this power to remit fines to the governor and in another fourth of the states the power is subject to the regulation

of the legislature. In most of the remaining states the governor has no constitutional authority to remit fines and forfeitures.

Military Powers

Most state constitutions provide that the governor shall be commander-in-chief of the military forces of the state. This power in ordinary times applies to the organized militia, which are called into active service to meet special emergencies. About half of the states qualify this power by the clause "except when they are in the service of the United States"; and several provide that the governor shall not command in person without the consent of the legislature, an unwarranted limitation in view of the usual emergency nature of the exercise of this power. As commander-in-chief, the governor has the power to call out the militia to execute the laws, to suppress insurrections, and to repel invasion. In some states this usual provision is limited to specified purposes; in others it has been found necessary to extend it to other purposes as to preserve the public peace or (in Oklahoma) to protect the public health. In view of the unpredictable form in which disasters and emergencies can occur, undue procedural or purpose restrictions might prove exceedingly harmful.

External Relations

The governor normally acts as the general agent of the state in relations with the Federal Government and with other states. Under the U. S. Constitution he may (when the legislature is not in session) apply for national aid to protect the state against domestic violence. He issues certificates of election to members of Congress, and certifies the action of the state legislature on proposed amendments to the U. S. Constitution.

In many other matters of interstate relations, the governor represents the state, either on his own initiative or on the authority of the legislature. Thus he may institute legal proceedings in the name of the state or authorize the defense of suits brought against the state.

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VII

THE JUDICIAL DEPARTMENT

A staff paper prepared by Public Administration
Service for the Delegates to the Alaska
Constitutional Convention

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THE JUDICIAL DEPARTMENT

Delegates to the Alaskan Constitutional Convention are well aware of a general dissatisfaction with the present system of the administration of justice in the Territory of Alaska. Unlike Hawaii, which has been able to create its own system of territorial courts, Alaska still operates under a judicial system imposed on it by the federal government. The machinery which was created for a less populous area and for a time when case load was not so great is no longer adequate for the needs of the Territory. That machinery, moreover, offers comparatively little which would be satisfactory by way of a model for judicial machinery for the State of Alaska.

That such is the case implies no criticism of present or past occupants of judicial posts in the Territory of Alaska. Many of these persons have been and are dedicated to their jobs. Many have performed courageously under the trying conditions of overwork, weather, and geography. The patchwork quilt of the Territorial judicial system is, however, proving more inadequate each year to meet the demands of a growing and thriving area. Geography and the comparative isolation of many smaller communities poses a problem in judicial structure and administration almost unique to the Territory, and to the future State, of Alaska.

The issue of what principles and concepts should be embodied in the Alaska Constitution so far as the Judiciary Article is concerned can be best discussed in terms of three basic questions: (1) What constitutional provisions should be made in reference to the organization of the court system? (2) What constitutional provisions should be made in reference to the personnel who will man the system? (3) What constitutional provisions may be needed relative to the administration of the court system which is created? It is the purpose of this Staff Paper to outline generally the practice of the various states on each of these three major questions and to summarize the results of various studies which have been made relative to state court organization, personnel, and administration.

In discussing most of the problems of government, there is a considerable variance of opinion between practitioners and theorists. This difference of opinion is probably smaller in the area of the judiciary than in any of the others. There is no other area where the variation of opinion is less, where the gap between theory and practice is smaller, than in the conclusions which have been reached by both theorist and practitioner is prescribing remedies for the defects of state judicial systems. Judges, practicing attorneys, laymen, and legal theorists who have studied the problems of the administration of justice in the United States show a startling unanimity of opinion in their prescriptions for correcting the ills of the judicial system.

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The fact that practitioner and legal theorist have reached generally similar conclusions has not, however, resulted in any considerable number of changes in state practice. The full weight of the American Bar Association, for example, has been thrown behind a number of suggested court reform proposals, yet these proposals have, for the most part, languished without implementation by the appropriate political agencies of government. "What ought to be" and "what is" are still in most states very different things.

Constitutional Provisions on the Organization
of the Judicial System

In the organization of a state judicial system there are two fundamentally related problems. The first is concerned with the structure of the judicial system, that is, the arrangement of the various courts which make up the system and their relationship to each other. The second problem, which is not separable from the first, is that of the jurisdiction of the various elements which make up the state judicial system. Jurisdiction for the purpose of this Staff Paper may be defined as the power which a court has to hear and decide, or to review, a case or controversy presented to it.

The Structure of the Judicial System

State court systems today have the basis of their mechanical setup in both constitutional and statutory provisions. Characteristically, the amount of detail found in state constitutions on

court structure is very great. It is a matter of no small significance that practically all of the moves for constitutional revision in recent years have been preceded by attempts to amend the judicial article of state constitutions. Failing to change archaic and outdated court machinery by amendment, these groups have then espoused the cause of over-all constitutional revision.

While the court systems have varied greatly in structural detail from state to state, there has been a considerable uniformity on one point: the judicial articles have been highly detailed. Provision is made in every state for a supreme court or a court of similar position called by another name. Thus the highest court of New York is denominated the Court of Appeals. A lower level or levels of courts is then created constitutionally. In about two-thirds of the states this is a trial court level; in about one-third of the states lower level appellate courts, designed to ease the appellate burden of the high court, have been established in addition to the trial courts. Most state constitutions specify the number, type, jurisdiction, and even the geographical boundaries of the various lower levels of courts thus created. In addition to the trial courts of general jurisdiction and the intermediate appellate level courts, where the latter are established, the constitutions of the states often mention the county courts and declare them to be agencies primarily of probate and limited criminal and civil jurisdiction.

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Even the number and method of selection of county judges is frequently constitutionally ordained. There are even state constitutions that spell out in detail the structure of courts at the lowest level--the justice of the peace courts and the various municipal courts.¹

The result of such attention to judicial detail in constitutional documents is precisely what could and should have easily been anticipated. With the growth of population, shifts in economic base, and industrial and agricultural expansion, most states have found their judicial articles outmoded almost before the ink was dry on the document which created the machinery. Of necessity, constitutions have been amended again and again to provide new trial courts and additional judges of general jurisdiction for areas of a state which have grown in population. Having written the details of jurisdiction and machinery into the constitution, creation of new and special courts designed to handle specific problems, e.g., juvenile courts, domestic relations courts, and the like, is frequently the only recourse which an harrassed legislature can take. And even these special courts often find their way into many constitutions through the handy device of constitutional amendment. Makeshift is piled upon makeshift and the process is still being compounded in numerous states.

¹ E.g., Maryland Const., Art. IV, secs. 17-43.

The resulting crazy-quilt patchwork of courts almost defies diagrammatic description. Overlapping jurisdiction, lack of uniformity, poorly qualified personnel, timewasting and archaic procedure--these and other faults can be traced directly to the overly detailed judicial provisions in state constitutions. The final result has been, of course, the administration of something less than justice in many state courts.

Students of the American system of courts have been aware of these defects for years. Again and again they have emphasized the role played by detailed constitutional provisions in the creation of these defects. With judicial machinery set out in detail in constitutions so that change can be accomplished only by arduous and time-consuming process of constitutional amendment, little flexibility is possible.

In the drafting of constitutional provisions dealing with the organization of the Alaskan judicial system, the delegates will wish to keep in mind the general principles laid down by the eminent Dean Roscoe Pound, acknowledged authority in the field of judicial organization and administration. In 1941, in addressing the Junior Bar Section of the New Jersey Bar Association, he said.

In . . . simplifying the organization of courts, the controlling ideas should be unification, flexibility, conservation of judicial power and responsibility.

Unification is called for in order to concentrate the machinery of justice upon its tasks. Flexibility is called for to enable it to meet speedily and efficiently

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the continually varying demands made upon it. Responsibility is called for in order that some one may always be held and clearly stand out as the official to be held if the judicial organization is not functioning the most efficiently that the law and the nature of its tasks permit. Conservation of judicial power is a sine qua non of efficiency under the circumstances of the time. There are so many demands pressing upon our state governments for expenditures of public money that so costly a mechanism as the system of courts cannot justify needless and expensive duplications and archaic business methods.²

While Dean Pound was laying down his four criteria primarily as yardsticks for judicial reorganization of state court systems already in existence, they have equal or greater applicability in the Alaskan situation where a judicial machinery must be created de novo.

Unification may be defined as the integration of all the levels of courts of the state system into one overall and cohesive administrative unit. Ordinarily such unification would not include courts at the municipal level, but the concept of unification is broad enough to effect that inclusion if such a policy is desired. The result is a simplified system which provides a rational basis for economical and efficient administration. Of greater importance, the principle of unification eliminates the jurisdictional controversies now so common in the courts of the majority of the states. By flexibility is meant the power to assign judges to courts and divisions of courts on the basis

² Reprinted in State of New Jersey, Constitutional Convention of 1947, II, 1587.

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Missing!!

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usually the governor in most states where such a power is lodged in the Court, who may request such opinions.

The number of judges necessary for such an Alaskan high court is a matter for argument and depends on a number of factors. If the judges of such a court are to do only high court work, and are not to spend any portion of their time in "riding circuit" and serving part-time as lower court judges, then such a Court in the early years of statehood can be small. A somewhat larger court would be necessary if the judges were required, at least in the first few years of statehood, to serve a portion of each year as trial court judges. The amount of appellate work immediately after statehood would be small, but a considerable increase in case load could logically be expected within a few years.

The practice of most states has been to set the number of supreme court judges in the constitution, thus making an increase impossible when work load has grown, except by resort to amendment. The Oklahoma Constitution constitutes one of the exceptions to this rule; that document set the original number of judges on the high court at five but allowed the legislature to increase the number later.⁴ The number of judges on the various state supreme courts varies from three in Delaware and Wyoming to nine in Iowa, Oklahoma, Texas, and Washington. About half the states have seven-judge courts, two have six, and remaining states have five.

⁴ Art. VII, sec. 3.

The practice of having supreme court judges serve a portion of a year as trial court judges has been eliminated in the United States for all practical intents and purposes. A few states, notably the smaller ones in area, require the Supreme Court to sit at more than one location in the state; no state having such requirements makes the Court hold terms at more than three places. The large states of Montana and Texas require their Supreme Courts to sit only at the capital. Rhode Island and Vermont have allowed the Court itself to exercise discretion as to where it will sit.

In about one-third of the states the supreme court is empowered, either constitutionally or by statute, to sit in divisions in order to handle the necessary appellate work load. In only five states, Alabama, Florida, Kentucky, Mississippi, and Missouri, has the practice actually been used. The trend is very definitely toward a fairly small supreme court, sitting, en banc, and with the members giving their attention solely to supreme court business.

Lower Appellate Courts. The amount of possible judicial business in the new State of Alaska would probably not require at the outset a set of lower appellate tribunals. These courts, designed to serve as buffers for the state supreme court, are found in approximately one-third of the states today. As would be imagined, their incidence is greatest in those states having

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larger populations. Constitutional provisions respecting the judiciary in the Alaskan Constitution should be flexible enough, however, to allow the establishment of intermediate appellate tribunals if and when they might be needed.

Trial Courts of General Jurisdiction. A level of courts immediately below the Alaskan Supreme Court will most certainly be needed. This level will probably be a general trial court system empowered to try in its original jurisdiction causes arising under the Constitution and laws of the state. General criminal and civil jurisdiction would be vested in these courts and, following the practice of the western states, there would be no dichotomy between law and equity as found in some eastern states. Limited appellate jurisdiction from municipal and rural courts would also be necessary.

State practice in the nomenclature of this level of courts varies greatly. Some states call them superior courts, some circuit courts, and some district courts. Regardless of nomenclature, each such court exercises jurisdiction over a determinable geographic area. In highly populated areas, or areas of considerable litigation, such courts may sit in divisions.

Some question will arise as to whether, in the Alaskan situation, this level of courts should be invested with the probate jurisdiction ordinarily found at the county or special probate court level in most states. This is a question probably best

resolved by the legislature within the framework of a unified court system and will be discussed in a later portion of this Staff Paper. The general question of probate jurisdiction will, therefore, be passed over for the moment.

Local Courts of Limited Jurisdiction. Local courts will be needed in the new State of Alaska. In many ways this local court problem is the one least susceptible of completely satisfactory solution. Certainly the experience of the states has been that justice is least efficiently, economically, and correctly administered at this level of courts. The system of United States Commissioners in Alaska has never proved to be completely satisfactory. The problem is doubly compounded for Alaska because of the relative isolation of many small Alaskan communities. These small communities cannot carry by themselves the financial burden of a full-time, well-trained, and highly qualified judge. Nor is such a person needed in such communities except on a very few occasions each year.

Yet there is a considerable amount of work to be transacted at this level of the judicial machinery. Classified in terms of amounts of money or in terms of the seriousness of crime the business is "petty." But to the individuals immediately concerned, the litigation or charge is of extreme importance. Moreover, in terms of sheer numbers, the citizens' associations with the courts take place for the most part at this level. Impressions

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of the entire judicial machinery are often formed because of a contact with a justice of the peace or municipal court judge.

Significantly all studies which have been made of the administration of justice have recommended the abolition of the justice of the peace court. These studies have condemned the excessive numbers, lack of qualifications, reliance on the fee system, lack of decorum, lack of facilities and necessary clerical assistance, poor keeping of records, lack of supervision, and low prestige of these courts. Moreover the justice of the peace system has been peculiarly susceptible of political manipulation and has formed the basis for many local political machines. The magistrates' courts, the urban counterparts of the justice of the peace courts, have been similarly criticized.

Provisions for magistrates' courts and justice of the peace courts have customarily been made by statute. Yet some states have written even these lowest level courts into their constitutions. Louisiana may be cited as an example, though it is true that the legislature was empowered to abolish the office of justice of the peace if it saw fit.⁵ For political reasons, the office has not been abolished.

The Delegates will almost certainly be thinking about and discussing this problem of the necessary administration of

⁵ Const., Art. VII, secs. 46 ff. The Louisiana Constitution devotes 30 pages of 10-point type to its judicial article, covering therein an extraordinary array of various types of courts, qualifications of judges, etc.

justice at the lowest level, where whatever courts are eventually established will be of limited civil and criminal jurisdiction. Yet the Constitution itself is probably no place to attempt the solution of such a problem. Logically the ultimate decision in the matter should be reached by the legislature and should be subject to change by that body to meet new circumstances.

The Problem of Special Courts. Courts of special jurisdiction have become increasingly common in recent years. Juvenile courts, orphans' courts, domestic relations courts, small claims courts, and many others have made an appearance on the judicial scene. The theory underlying the creation of such courts has been based on the 20th Century idea of specialization. Juvenile courts are created so that judges and attaches especially trained to work with young people will be handling these special problems. Domestic relations courts have been established under a similar argument. Small claims courts have been established not so much to gain the advantage of the experience of a specialized judge but rather to facilitate the settlement of claims too small to be handled economically in the regular courts.

Significantly, the great majority of these specialized courts have been established in densely populated areas, though courts for the handling of juveniles are now found in a number of rural areas as well. There must be a basic case load present in order to justify the expenditures of money necessary to the

proper operation of such courts and this case load ordinarily does not exist outside the cities. Arguments against establishing such courts by constitutional mandate are well-nigh overwhelming, for prediction as to where such specialized needs would arise in the future are almost impossible.

Summary. At the outset, then, it is probable three levels of courts would be necessary to meet Alaska's needs: (1) a Supreme Court, (2) a level of courts of general civil and criminal jurisdiction, with the possibility of probate jurisdiction as an added function, and (3) local courts.

Constitutional Provisions on Court Structure

Constitutional provisions on court structure should be drawn in general terms and should be so drafted that necessary alterations to meet changing needs can be effected by the legislature without resort to the process of constitutional amendment. The constitution should provide for a Supreme Court and should probably provide, also, for the original number of judges of that Court, with a provision that the legislature may later increase the number of judges.

The Constitution should empower the legislature to create inferior courts and probably should make no mention of court structure at the local level. Adherence to the latter idea will prevent much fruitless debate. A decision to avoid writing local court structure into the Constitution and empowering the legislature to create inferior courts will follow, in the main,

the pattern set by the Framers of the national Constitution in 1787. Local court structure can thus be altered easily when circumstances demand.

Some consideration must be given to the issue of whether or not the trial courts of general and civil and criminal jurisdiction should receive mention as such in the Constitution. The Hawaii Constitution simply provided:

The judicial power of the State shall be vested in one supreme court, circuit courts, and in such inferior courts as the legislature may from time to time ordain and establish.⁶

The number of Supreme Court justices is set at a total of five. No mention is made as to the number of circuit judges.

The New Jersey Constitution is somewhat more explicit on the point. The judicial power of the state is vested in a "Supreme Court, a Superior Court, County Courts and inferior courts of limited jurisdiction."⁷ The number of Supreme Court justices is set at seven. The legislature is allowed to set the number of Superior Court judges, in no case less than a constitutional figure of 24. The Superior Court is then divided, constitutionally, into three divisions: Appellate, Law, and Chancery.⁸ The Appellate Division thus becomes a buffer protecting

⁶ Art. V, sec. 1.

⁷ Art. VI, sec. I (1).

⁸ Art. VI, sec. III.

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the Supreme Court of New Jersey against the pressure of appeals. Such an appellate arrangement is not, of course, immediately required in Alaska. Functions of a number of specialized courts are incorporated into the New Jersey county courts with a resulting expansion of jurisdiction. The older jurisdiction of the county courts is made subject to change by law.

It should be noted that there is one superior court. The Alaskan Convention may wish to consider the possibility of providing constitutionally for one court, by whatever name, of general civil and criminal jurisdiction. The principle of unification, so much stressed by legal authorities on judicial administration would thus, when taken in combination with certain other points yet to be discussed in this Staff Paper, be incorporated into Alaskan fundamental law. To the legislature should be left the task of determining the precise number of judges for such a court and its various divisions.

There is another form which the Convention might take, should it care to do so, in writing a unified court system into the Constitution. The Convention might provide for a general court system, perhaps called a general court of justice, with a Supreme Court "department" (or other similar term) and such other "departments" as the legislature might approve.⁹ If unification is desired, there is no particular advantage to

⁹ This is the arrangement set out in the Model State Constitution of the National Municipal League. Art. VI, sec. 600.

this type of language over that suggested in the previous paragraph. If the Chief Justice be made the true administrative head of the system, as discussed later in this Staff Paper, then little will be gained by such sweeping constitutional terminology. Neither, on the other hand, is there any major objection to the use of such language.

One fact is, however, strikingly clear. The language chosen by the Delegates must be susceptible of flexible interpretation and must allow the legislature considerable leeway. The experience of many of the states has demonstrated conclusively that writing detail into constitutions is generally to be frowned upon but nowhere more so than in the judicial article. The Delegates should not feel, in thus refraining from outlining in detail the various levels of courts, the numbers of judges, their geographic jurisdiction, etc., that they are not fulfilling their responsibility. No element of "passing the buck" to the First State Legislature is present. It is true that the First Legislature will be a harrassed body, beset by the necessity of implementing a thousand and one facets of the Constitution. But if mistakes are made by that Legislature, and they will be, subsequent legislatures can easily correct them. A mistake by the Convention is susceptible of correction only through the process of constitutional amendment, whatever the process may ultimately prove to be.

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Jurisdiction of Courts

The second phase of the organization of the judicial system is that of the jurisdiction of the courts. The term has cropped up repeatedly in the past few pages, for it is well nigh impossible to speak of court structure without including, at the same time, statements relative to the jurisdiction of the levels of courts which are created.

The typical state constitution is rather more apt to contain excessive detail on the structure of the state court system than it is to contain overly detailed descriptions of the jurisdiction of the various levels of courts. Nevertheless, state constitutions generally do contain material dealing with jurisdiction which has served to make the administration of justice inflexible in many cases. The tendency in recent constitutions, like that of New Jersey, Missouri, and Hawaii, has been not only to simplify and centralize the structure of the judicial system but to cut down the amount of detail in the area of jurisdictional pronouncements. The Georgia Constitution, on the other hand, even though recently revised, devotes 11 pages of small type to its judicial article; jurisdiction of the various levels of courts is spelled out in detail.

The Hawaiian Constitution simply declared that the several courts established by the fundamental law and the legislature "shall have original and appellate jurisdiction as provided by law."¹⁰ The Model State Constitution is somewhat more explicit

¹⁰ Art. V, sec. 1.

on the point of jurisdiction:

The general court of justice shall have original general jurisdiction throughout the state in all causes, including claims against the state. The jurisdiction of each department and subdivision of the general court of justice shall be determined by statute or by general rules of the judicial council not inconsistent with law, provided that the legislature shall determine the jurisdiction of the supreme court department by law.¹¹

The New Jersey Constitution contains the following provisions on jurisdiction:

The Supreme Court shall exercise appellate jurisdiction in the last resort in all causes provided in this Constitution.

. . . The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted.

The Superior Court shall have original general jurisdiction throughout the State in all causes.

The Superior Court shall be divided into an Appellate Division, a Law Division, and a Chancery Division. Each division . . . shall hear such causes, as may be provided by the rules of the Supreme Court.¹²

The problem of appellate jurisdiction is concisely set out further in section 5 of the New Jersey judicial article:

1. Appeals may be taken to the Supreme Court:
 - (a) In causes determined by the Appellate Division of the Court involving a question arising under the Constitution of the United States or this State;
 - (b) In causes where there is a dissent in the Appellate Division of the Superior Court;
 - (c) In capital causes;
 - (d) On certification by the Supreme Court to the Superior Court and, where provided by rules of the Supreme Court, to the County Courts and the inferior courts; and
 - (e) In such causes as may be provided by law.

¹¹ Sec. 601. The Model State Constitution establishes one general court of justice of which the various levels are parts, called departments.

¹² Art. VI, infra.

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2. Appeals may be taken to the Appellate Division of the Superior Court and from the Law and Chancery Divisions of the Superior Court, the County Courts, and in such other causes as may be provided by law.
3. The Supreme Court and the Appellate Division of the Superior Court may exercise such original jurisdiction as may be necessary to the complete determination of any cause on review.

The flexibility of the Hawaiian and New Jersey articles on the subject of jurisdiction is apparent.

While the structure of the New Jersey court system is manifestly more complicated than that immediately demanded by the Alaskan situation, the Delegates will wish to consider carefully the type of approach taken to the question of constitutional provisions on jurisdiction in the Hawaiian, New Jersey, and Missouri documents¹³ compared with that taken in the Georgia Constitution¹⁴ and others with similar or greater detail.¹⁵

The New Jersey Constitution does not mention probate jurisdiction specifically, though the county courts exercise this power. The Missouri Constitution, on the other hand, actually provides for a "probate court in each county" with

¹³ Mention of these three should not be taken to mean that there are not others which are generally on the less detailed side in the matter of constitutional provisions on jurisdictions. See, e.g., Tennessee Const., Art. VI.

¹⁴ Art. VI, especially sec. II, pars. 4 and 8; secs. IV, VI, VII, and XIV.

¹⁵ E.g., Maryland Const., Art. IV. The Maryland article is 20 pages long and provides a fine example of length, inflexibility, and detail in judicial articles.

jurisdiction of all matters pertaining to probate business, to granting letters testamentary and of administration, the appointment of guardians and curators of minors and persons of unsound mind, settling the accounts of executors, administrators, curators, and guardians, and the sale and leasing of lands by executors, administrators, curators, and guardians, and of such other matters as are provided in this Constitution.¹⁶

While the issue of probate jurisdiction, as such, may not properly be a part of constitutional phraseology, the question is certainly one which, along with the establishment of local courts, will eventually require considerable attention by the legislature of the State of Alaska.

Constitutional Provisions on Judicial Personnel

The men of Massachusetts, it was said, could have made any constitution work. The statement was a tribute to the American revolutionary fathers. More than that, it places emphasis on the importance of properly qualified persons in the performance of the many tasks of government. To speak of the importance of personnel is not to deny that the finest type of individuals can be unduly hampered in the efficient discharge of their duties by poor organization and lack of legal authority. But the best of systems will bog down if the personnel is of low quality.

Each profession likes to think that certain unique personal qualities are required for success. How true this may be in each case must be left to the psychologists. Certainly those judges who have been rated most highly by their contemporaries have had

¹⁶ Art. V, sec. 16.

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widely assorted temperaments, backgrounds, and training. Yet there have been striking similarities also, similarities of honesty and integrity, objectivity insofar as that trait is capable of attainment by fallible beings, technical knowledge, and a willingness constantly to be a student of the law

Provisions on the Qualifications of Judges

The qualities which really are necessary for a "good" judge are incapable of precise definition by constitutional or statutory provision. All but three of the states and the national government have, however, set out in one form or another certain limited qualifications which judges must have. In some constitutions qualifications are set out only for supreme court judges; other fundamental documents include the judges of lower courts, or some of them, as well.

Age, residence, United States citizenship, and experience are the four qualifications usually set out.

Three states, Connecticut, Massachusetts, and New Hampshire, have set out no legal qualifications for judges whatsoever in their constitutions. A minimum age ranging from 21 to 35 years, is found in all but eight states for membership of appellate courts. All but eleven states have set up some sort of minimum residence requirement for membership on the appellate court level. Thirty-one states have decreed formally that appellate court judges shall be United States citizens.

About three-fourths of the states have attempted to set requirements of experience. These requirements are so rudimentary, however, that few persons who have been admitted to the practice of law before the state's highest tribunal are unable to meet them. The phrases "learned in the law" and "legal experience" are the criteria most frequently established. It is interesting to note that in some states, like Texas, it has been held that even these requirements are merely recomendatory to the voters and that one may be chosen a judge even if he does not have these requirements!

A very small minority of states have incorporated requirements like good character, sobriety, and belief in God. The Maryland Constitution, for example, declares that judges shall be selected from those who "have been admitted to practice Law in this State; and who are distinguished for integrity, wisdom and sound legal knowledge."¹⁷ Requirements of this type supply no very satisfactory yardstick for the choice of judges.

Elective versus Appointive Judges

Many decisions in regard to the structure and jurisdiction of the future Alaskan court system are probably best left to legislative choice. There is one decision, however, which must perforce be made by the Delegates at College. The method of choosing state court judges, or at the minimum the judges of the Supreme Court, must be determined by the Alaskan Constitutional Convention.

¹⁷ Art. IV, sec. 2.

During American Colonial times, judges were chosen by the king and held office for life, subject to good behaviour. This method of appointment and tenure was kept after Independence and most states down to about the time of the Civil War continued to obtain their judges through appointment by state governors subject to approval by state senates or state legislatures as a whole.

The stirrings of popular democracy, as the term is understood today, were found in the Jacksonian period. By the end of the Civil War, considerable shifts in attitude toward the American judiciary had taken place. The life tenure of judges was cut in many states and judges were elected rather than appointed. States entering the Union after the Civil War and immediately prior to it almost universally provided for elective judgeships. Advocates of such an election process argued that it was basically more democratic and made the judges more responsive to the "will of the people." Indeed, in eleven states, the principle was carried to the point where judges to the Supreme Court are elected from single member districts.

But the high hopes of those who were able to implement their views and provide for the elective judges were not realized. Party hacks, rather than persons who were best qualified, ran for the elective positions, in numerous instances. The type and quality of state judicial personnel thus attracted was not

up to the equal of the federal judiciary, where the appointive principle continues to operate today.

That the principle of elective judges continues to have immense vitality today cannot be doubted.¹⁸ There are many states where constitutional revision has been defeated at one stage or another because the advocates of such revision have espoused appointive judgeships or some variation of the appointive principle. There are, therefore, sound reasons for the Delegates to the Alaska Constitutional Convention to examine the problem of methods of selecting judges with some care.

Students of the problem of choosing judicial personnel are fairly well in agreement that the election process is not the best method for securing good judges. Men who are by temperament capable of waging energetic and successful election campaigns are not always equally well qualified for a judicial position; time and again this point has been demonstrated in practically every state where the principle of elective judgeships prevails.

Nevertheless certain practical factors have appeared on the scene which have served to mitigate a bit the defects of the elective system. First of all, it has been found that most sitting judges do run for reelection, and often without opposition. A second factor of great importance is that there are

¹⁸ Three states, South Carolina being the notable example, let the legislature, rather than the governor, select the judges.

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comparatively few original elective judgeships, particularly at the level of the higher courts. Ordinarily, a judge continues to run for reelection, and is elected without opposition, until he dies. If he retires, he frequently does so not at election time but rather in midterm. The practical effect of this process is that the Governor appoints a person to fill the vacancy until the next election--at which time the person appointed ordinarily runs for reelection without opposition. A third factor may be mentioned in connection with the elective judgeship idea. Sixteen states using the principle have switched the election process to a time other than that when elections for important political offices are held and have utilized a non-partisan ballot, thus removing to some extent at least the play of partisan politics. If the elective process is the one that is finally chosen by the Alaskan Convention, the non-partisan election, held at a time other than that when important national offices are in dispute, deserves consideration.

Recently Developed Methods of Selecting Judges

Concern over the generally poor quality of judges resulting from the elective process, even with the mitigating factors just mentioned, has resulted in some hard thinking by bench, bar, and interested laymen. While 45 of the 48 states continue to elect judges at one or more levels of their state court system, the trend of newer constitutions has been away from the straight elective process at the higher levels.

The Missouri Plan. The major interest has centered on a plan given general approval by the powerful and influential American Bar Association. Popularly, the plan is known as the Missouri plan, though in actual operation the Missouri scheme is a modification of a plan adopted earlier in 1934 in California. The plan is a combination of the appointive and elective ideas. Original appointment to the appellate courts of Missouri is effected by the Governor, but his choice is limited to a panel of three names determined by a nonpartisan judicial commission composed of the Chief Justice of the Missouri Supreme Court as chairman and six members. The six consist of three lawyers, one elected from each of three courts of appeals districts, and three laymen appointed by the Governor, one from each of the three districts. Terms of the members are for six years, with the exception of the Chief Justice, and are staggered so that one member retires each year.

The judge so selected serves for one year and at the next general election following the year of service, the judge's name goes on the ballot, without opposition, with the voters saying "yes" or "no" to the question of whether or not he shall continue in office for a regular term. The term for judges of the Supreme Court and the appeals courts is twelve years. A similar selection process operates for judges of the state trial courts; their term is six years.¹⁹

¹⁹ Missouri Const., Art. V, sec. 29(a)-(g).

Thus the judge runs, in effect, against his record. At the end of his regular term, should he desire another, he once again runs against his record. Should the voters' answer be "no" at any time, the Governor makes another appointment in the same fashion as just outlined. The plan thus combines the features of the appointive system and enables the voters to have a say in the process of retention. Moreover, a politically minded governor would find his powers to fill the judiciary with political hacks somewhat curbed. The Bar is given a voice in the process of original appointment but not to the exclusion of the layman.

The system has been favorably appraised by Missouri commentators and by the American Bar Association. In at least one instance, the voters did refuse to retain a judge at the end of his probationary period. Missouri voters have specifically approved the plan as a whole on three separate occasions: it was adopted as a constitutional amendment in 1940; it was approved a second time in a referendum held in 1942; and it was carried over into the new Constitution in 1945.

The California Plan. The California plan allows the Governor to make the original appointment subject to the approval of a commission. The Missouri Plan thus limits the Governor's discretion of choice more than the California system. Appellate and Supreme Court judges in California serve twelve year terms,

at the end of which time the judge may at his request be put on a ballot without opposition with the question of retention the sole issue to be decided by the voters. If the judge does not declare himself, the Governor makes another appointment. There is no probationary period as in Missouri. It is important to note that the California Plan has drawn criticism because the commission has become in many instances a mere ratifying agent of the Governor.

The Model State Constitution Provisions The plan of the Model State Constitution is nowhere in effect. It is novel in that the Chief Justice holds the appointing power and makes the appointment from a panel of three names drawn up by the Judicial Council. The judge serves a year's probationary period, as in the Missouri Plan, and then goes on the ballot "against himself" as in the Missouri Plan. At the end of four years the judge would again go on the ballot. If approved, he would serve the remaining eight years of a total twelve-year term.²⁰

The New Jersey and Hawaiian Examples. The New Jersey Constitution of 1947 provides that the Governor shall appoint the "Chief Justice and Associate Justices of the Supreme Court, the Judges of the Superior Court, the Judges of the County Courts and the judges of the inferior courts with jurisdiction extending to more than one municipality" with the consent of the New Jersey Senate.²¹ Supreme and Superior Court judges hold office for an original seven year appointment, and if reappointed hold

²⁰ Sec. 602.

²¹ Art. VI. sec. vi.

office for life subject to good behaviour.

The Hawaiian provision is very simple. Judges of the Supreme Court and the circuit courts would be appointed by the governor subject to senate approval.²² The term of a supreme court judge is seven years and a circuit court judge six.

These appointive provisions represent a return to the original American state practice and the practice on the federal level.

Summary of Selection Methods. In the selection of judges, the definite trend is back to the appointive method or some variation of it, as illustrated by the Missouri, California, New Jersey, and Hawaiian examples. The American Bar Association has been especially instrumental in pushing the Missouri Plan of selection.

Certainly the judge should be independent of political and personal pressures. This concept of the independent judiciary is one of the truly important features of American democratic government. How best to obtain and retain that independence for judges of the State of Alaska is based in no small measure upon the method of selecting judges which is chosen by the Alaskan Convention.

Provisions on the Tenure of Judges

Tenure also is a major factor in the preservation of the independence of the judiciary. Some would hold it more important

²² Art. V, sec. 3.

than the method of original selection. On the national level, the principle of tenure on good behaviour has been preserved (with generous provisions for retirement) but by the start of the 20th Century it had been abandoned almost everywhere else.

The arguments in favor of shorter tenure are fundamentally the same as those advanced in favor of election of judges. The theory is based on the idea that judges under life tenure tend to become overly conservative and to lose sight of the fact that times, and the needs of the times, change. If such a judge attempts to write his economic and social predilections into his constitutional interpretations, then society is in for trouble. This line of argument of course ignores the notion that the judicial branch is at times expected to stand as a buffer against momentary and transient popular majorities.

Only two states in the Union, Massachusetts and Rhode Island, appoint their high court justices originally for life, subject to good behaviour. New Hampshire appoints the justices to serve until age 70, in effect an appointment for life, and New Jersey appoints for a seven year term with reappointment until age 70. The terms of high court justices in other states varies from two years in Vermont to 21 in Pennsylvania. Eighteen states have 6 year terms and 9 eight year terms. Other states have 10 and 12 year terms, except Maine which has a seven year term, New York and Louisiana which have 14 year terms, and Maryland which has a 15 year term.

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As an ideal, tenure to a reasonable retirement age may be desirable for justices of the highest court. A majority of states, however, have settled on definite tenure ranging from 6 to 15 years. The Missouri and California Plans represent modern approaches to the tenure problem.

Provisions on Salaries and Retirement of Judges

We are concerned primarily here with the possibility of constitutional provisions on the retirement of judges. Most state constitutions have not, and quite properly so, been concerned with setting the amount of the salary of judges or with outlining complicated pension and disability schemes for judges. These are matters properly within the province of the legislature. The majority of state constitutions have followed the lead of the federal Constitution and have provided that the salaries of the judges of the state court system shall not be diminished during their term of office.²³ This is certainly a sound provision in aid of the independence of the judiciary.

The question of retiring judges, except when they choose voluntarily to do so, is a delicate matter. A senile judge does not always recognize his infirmity and in most state constitutions there is little way of forcing retirement except through the extra-legal process of prevailing upon him not to run at the next election. In the case of such a judge, one might be disposed to argue the efficacy of short judicial terms:

²³ E.g., Tennessee Const., Art. VI, sec. 7.

The New Jersey Constitution attempted to make specific provision for forced retirement in the following terms:

Whenever the Supreme Court shall certify to the Governor that it appears that any Justice of the Supreme Court, Judge of the Superior Court or Judge of the County Court is so incapacitated as substantially to prevent him from performing his judicial duties, the Governor shall appoint a commission of three persons to inquire into the circumstances; and, on their recommendation, the Governor may retire the Justice or Judge from office, on pension as may be provided by law.²⁴

The Missouri Constitution of 1945 provided for compulsory retirement for "continued sickness or physical or mental infirmity" through a committee of three supreme court judges, one judge from each of the three courts of appeals, and three circuit judges, all elected by their respective courts. A finding of two-thirds of the committee sends the subject judge into retirement at half pay.²⁶

The Maryland Constitution makes the procedure far more difficult by requiring a two-thirds vote of each house of the legislature plus the approval of the governor for forced retirement.²⁶ New Hampshire, as has been noted, appoints judges to serve until the age of 70, thus neatly solving the retirement problem if a judge's physical and mental ability decline beyond usefulness upon attaining the 70th birthday. A compulsory retirement age of 70 is fixed by constitutional provision in Connecticut, New Jersey, and New York, 75 in Missouri, and 80 in Louisiana.

²⁴ Art. VI, sec. VI (5). Another paragraph of this section states that provisions for the pensioning of justices shall be made by law.

²⁵ Art. V, sec. 27.

²⁶ Art. IV, sec. 3.

All the states have, of course, made statutory provision for voluntary retirement machinery. In some cases the statutes set a compulsory maximum retirement age as well as a voluntary minimum age. Minimum age retirement ranges from no set age, but with a minimum number of years of service, to set minimum ages plus minimum years of service.

Mention has been made of the statutory systems because the creation of such systems is sometimes accidentally made difficult by other constitutional provisions. Alabama, for example, has a general constitutional provision against the payment of pensions; thus retired judges serve as supernumerary judges and assist active judges. The New Jersey Constitution, on the other hand, specifically provides that the legislature shall provide for the pensioning of judges.²⁷ The Delegates to the Alaska Convention may wish to consider such a provision.

Provisions on the Removal of Judges

Compulsory retirement is, of course, one method of removing judges. So also is the voluntary method, if influence can be brought to bear on a given judge behind the scenes. This section of the Staff Paper is concerned with the more direct methods of removal, ordinarily for causes other than those which would necessitate retirement.

Impeachment is the most common and well known of these methods. All states but two make judicial officers subject to

²⁷ Art. VI, sec. VI(3).

it. Impeachment as a method of removal of public officers is prohibited in Oregon; they may be tried for malfeasance, etc., as for other criminal offenses.²⁸ In Nebraska, the impeachment is voted by the unicameral legislature but is tried by the Supreme Court, or, if a Supreme Court justice is involved, by all the district judges of the state.²⁹ While the efficiency of impeachment as a method of removal has been much argued, its almost universal application to members of the state judiciary have made its inclusion automatic in recent constitutions like Missouri, New Jersey, and Hawaii.

A second method of removing judges, available in 29 states, is that of the legislative address, or joint address or joint resolution as it is sometimes called. The majority required in the two houses is usually two-thirds. The method is clumsy and rather more apt to have a political basis than the process of impeachment, since the latter is generally regarded as a more serious type of action. The process has been used in Massachusetts with a considerable degree of objectivity and lack of political bias.

One of the favorite panaceas much prescribed by some students of government in the early part of the 20th Century was the recall. Usually the recall was tied in with two other instruments of popular democracy, the initiative and the referendum. As applied to judges the recall has had a stormy and

²⁸ Const., Art. VII, sec. 6.

²⁹ Const., Art. III, sec. 17.

unsatisfactory history. At the present time, only eight states apply it to judges³⁰ and but twelve states have the provision applicable to other officers. It would seem that the very nature of the judiciary and the demands placed upon it would be sufficient reason for not incorporating into the Alaskan Constitution such provisions applying to judges.

The chief executive of the state plays a very limited part in the removal of lower court judges in California, Florida, and New York. Mention has already been made of the role of the governor in the compulsory retirement provisions of the New Jersey Constitution. In a few states, justices of the peace are subject to executive removal.

Mention has previously been made, too, of the Missouri provision on compulsory retirement of judges which is, in effect, a judicial method of removal. Some six or eight states have variations on this type of removal. The Delegates will wish to consider some methods for removing judges as well as for their compulsory retirement. A general provision in the Constitution on impeachment applicable to all state officers will include the judges and no further specific mention of them needs to be made to make them subject to impeachment. The process of joint address may be similarly phrased. So far as the recall is concerned, it may be remembered that Arizona's bid for

³⁰ Arizona, California, Colorado, Kansas, Nevada, North Dakota, Oregon, and Wisconsin.

statehood was negated until she removed from her proposed state constitution a provision allowing the recall of judges. She removed the offending provision and then, upon the assumption of statehood, restored it. Whether any of the other methods deserve Constitutional consideration is a matter for consideration by the Delegates.

Summary of Provisions of Judicial Personnel

There are, then, five phases to the general problem of constitutional provisions on judicial personnel: qualifications, methods of selection, tenure, salaries and retirement, and removal. The first of these can be included in the Alaskan Constitution only in broadest terms and any qualifications set out will necessarily be extremely minimal and will not guarantee well-qualified personnel.

The second and third phases are matters about which the Convention will have to reach conclusions. Various methods of selection are available and each method has its strengths and weaknesses. The Constitution should not mention specific salaries but the Convention may wish to consider some machinery for the compulsory retirement of incapacitated or physically or mentally infirm judges. The question of provisions on removal may well be solved by general provisions applicable to all state officials, or at least officials of the executive and judicial branches.

Constitutional Provisions on Judicial Administration

Judicial business in the average state is not performed with efficiency and economy. Ordinary practices of sound management have not been applied to the operation of courts in most cases. Yet court activity can, and should, be handled efficiently. Many of the principles of management which have been proved practicable in private business and in the executive branches of many state governments can be applied to judicial operations with a saving in time, an increase in efficiency, a substantial saving of public funds, and a positive gain in the process of doing justice. Quite frequently dockets of one branch of state courts have been crowded while judges of another branch sit in idleness; cases are not always promptly called nor heard. More important by far, the courts of many states have been forced to function under rules of practice and procedure which are archaic and entirely unsuitable for 20th Century judicial activity. These rules often cannot be changed, even though the judges recognize the necessity for change, because the power to set the rules of practice and procedure has been lodged not in the courts but in the legislature.

There are three phases to the general problem of judicial administration. The Delegates of the Alaska Constitutional Convention will wish to consider constitutional provisions on each of these three phases, whether or not such provisions

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become a part of the final document. The three phases are: (1) rules of practice and procedure; (2) administrative office of courts; and (3) the judicial council

Rules of Practice and Procedure

The layman is generally aware that courts function under certain rules. If he has occasion to become involved in litigation before the courts, he usually becomes quite irritated in a very short space of time with what he is apt to call "legal hairsplitting" or "legal gobbledygook." Rules of practice and procedure of most states are customarily well nigh incomprehensible to the average layman. What the layman may not know is that the members of the Bench and Bar themselves are sometimes confused by the multitudinous rules of procedure and the infinite variations and exceptions to which they are subject.

The power to make such rules of procedure must lie somewhere. By this rule-making power is meant not only those subsidiary acts or supplemental rules consistent with legislative acts which every state permits its highest court to provide, but the power to alter, amend, and rescind any rule of practice and procedure, any law to the contrary notwithstanding, which does not abridge, enlarge, or modify the substantive rights of any litigant. Sometimes this is called the complete rule-making power.³¹

³¹ "The Rule-Making Power in the Courts," Project of a Constitution for the State of Louisiana, I, 979.

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For many years the great majority of the states vested the power to make rules exclusively in the state legislature or allowed the courts to share the power subject only to final approval by the legislature. Lawyers and judges found, however, that there were deficiencies in this type of rule-making. Legislatures were not, and are not today, always sympathetic with the problems of the judiciary in the field of practice and procedure. Moreover, legislatures, being in session on the average but a few months every two years, could not give the proper attention to a subject which interested them little and in which they had no basic understanding. The biennial session has meant, also, that necessary changes in rules were unduly delayed.

The trend in the last four decades, starting with New Jersey in 1912, has been to transfer the rule-making power from the legislature to the courts, or at least to allow the courts a much greater say in the process. The process of transfer has been particularly evident since 1930. For the most part, this transfer of power to promulgate, amend, and alter rules of practice and procedure has been accomplished without resort to constitutional provision. In the absence of constitutional provision, state legislatures have been held able to accomplish the transfer of authority by statute.

Three states have placed the rule-making authority in their courts by constitutional provision. The New Jersey Constitution of 1947 provides that the

Supreme Court shall make rules governing the administration of all courts in the state and, subject to law, the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of the persons admitted.³²

The Maryland Constitution was amended in 1944 to provide that the Court of Appeals (the name of the high court of Maryland) could

make rules and regulations to regulate and revise the practice and procedure in that Court and in the other courts of this State, which shall have the force of law until rescinded, changed or modified by the Court of Appeals or otherwise by law. The power of the courts other than the Court of Appeals to make rules of practice and procedure shall be subject to the rules and regulations prescribed by the Court of Appeals or otherwise by law.³³

Michigan also has delegated the rule-making power to the courts by constitutional provision, and the Hawaii Constitution places the power to promulgate rules of civil and criminal procedure in the Supreme Court.³⁴

Twenty-three states today invest the highest court with rule-making power; three of these states do it by constitutional provision as just noted, and the Hawaii Constitution would do so.

³² Art. VI, sec. II, par. 3. The phrase "subject to law" was interpreted in Winberry v. Salisbury, 74 Atl. 2d 406 (1950), as meaning that the rulemaking power in the New Jersey Supreme Court was not subject to overriding legislation. However the power was to be strictly confined to practice, procedure, and administration as such. It was pointed out that the phrase "subject to law" was added because there was some question in the Convention as to the power of the Court to make regulations trenching on substantive, as opposed to adjective, law in the absence of such a qualifying phrase.

³³ Art. IV, sec. 18a.

³⁴ Art. V, sec. 6.

The remaining twenty accomplish the delegation by statute. Of the twenty-three states, thirteen allow coverage of both civil and criminal procedure; ten limit the power to civil procedure only. Two categories of statutes may be briefly noted. The first type requires submission of the proposed rules to the state legislature so that they may be altered, amended, rescinded, or disposition otherwise made of them.³⁵ The second type of statute requires no submission.³⁶

The model of proper rules of procedure has been, of course, the Federal Rules of Civil Procedure. They are simple, concise, and adequate. The original Rules of Civil Procedure were adopted in 1938, pursuant to Act of Congress in 1934.³⁷ This act authorized the Supreme Court to promulgate a single uniform set of general rules applicable to all civil cases. The Rules as promulgated and any future changes as well were subject to Congressional veto or amendment; they were to be reported to Congress at the start of a regular session and were to lay before Congress until the end of a session. The 1938 Rules of Civil Procedure have been subjected to major revision since originally promulgated. The actual job of suggesting changes has been accomplished by a committee consisting of judges, lawyers, and

³⁵ As in Florida, Iowa, South Dakota, Texas, and Wisconsin.

³⁶ E.g., Arizona, Colorado, New Jersey, Pennsylvania, and Washington.

³⁷ Now incorporated in 28 U. S. C., sec. 2072.

law professors. The Federal Rules of Civil Procedure have been adopted in the Territory of Alaska.

Acts of Congress in 1933 and 1940 granted the United States Supreme Court the power to prescribe rules of practice and procedure in criminal cases. The Federal Rules of Criminal Procedure became effective in 1946. Effective 1 July 1954, the Supreme Court put into effect a completely revised and reworked set of Supreme Court Rules.

There can be little argument that the courts should be invested with the rule-making power. The first recommendation adopted in 1938 by the House of Delegates of the American Bar Association declared that "practice and procedure in the courts should be regulated by rules of court and that to this end the courts should be given full rule-making powers."³⁸ The courts are certainly the best instrument for accomplishing the aim of uniform and adequate rules of practice and procedure.

In practice, however, it has been found that even though the judiciary is granted such powers, whether by constitutional provision or by statute, some additional stimulus is needed to get the project going. Real and substantial progress in revising outmoded and antiquated rules has been made in most cases only where some supplemental agency, such as an advisory committee or a judicial council, has provided the necessary impetus. Such supplementary assistance is sometimes specifically

³⁸ American Bar Association, The Improvement of Justice, A Handbook (3rd ed., 1952), 10-12.

provided by statute, but the majority of the states which invest their supreme courts with the rule-making power have made no provision at all in their statutes for such assistance.

So far as the Delegates to the Alaskan Constitutional Convention are concerned, the problem is fundamentally one of whether or not the rule-making power should be invested in the Supreme Court of the State by constitutional provision. In the absence of any provision on the rule-making power, the legislature would have the power to adopt such a provision, but in absence of constitutional provision the legislature could retain the power itself.³⁹ Were the Delegates to make constitutional provision for a judicial council, discussed later in this Staff Paper, then they might wish to incorporate as one of the functions of such a council the duty to serve as an advisory or supplemental agency to the Supreme Court in the promulgation of rules of practice and procedure.

An Administrative Office for the Courts

In recent years there has been an ever-increasing realization on the part of persons interested in the administration of justice that a number of the problems involved are not strictly judicial but administrative in character. There are many problems in court operation besides that of deciding cases. In a

³⁹ In the absence of constitutional provision granting rule-making power to the courts and in the absence of a statutory enactment to similar effect, some legal question would arise as to whether the courts could exercise such authority on their own initiative.

judicial system of any size there are the many day-to-day problems involving such things as payrolls, accounting, preparation of budgets, purchase of books and supplies, and many other such activities, including, in a well ordered system, statistics on types of cases, their disposition, etc. There is also the administrative problem of seeing that the various units of the system are keeping abreast of their dockets, that proper disposition of cases is being made, and that particular judges are not overworked while others have comparatively little to do.

The executive branches of state governments have a certain amount of centralization for administrative purposes. Private business has long since learned that certain administrative functions must be centralized in order to maintain proper efficiency and coordination. The judicial systems of the United States, however, have not as a general rule been operated on such a basis, even though there are many elements of judicial activity that should be so run. In the great majority of states, individual judges have carried on fairly much as their own spirit and inclinations have moved them.

Prior to 1922, the federal judiciary conducted its activities with each court virtually an independent unit. There was no unifying or supervising head. In that year, Congress gave the Chief Justice of the United States some supervisory authority and created the Judicial Conference of Senior Circuit Judges. Experience with the system proved that highly beneficial results should be obtained from centralization of

administrative activity. In 1939 the Administrative Office of United States Courts was created, with a Director and an Assistant Director holding office at the pleasure of the Supreme Court.⁴⁰

This Administrative Office has no administrative duties relating directly to the Supreme Court, but it has many duties relating to the other courts in the federal system. The Director of the Office, working under the Judicial Conference, has three primary functions. He is first of all responsible for the collection of judicial statistics; these statistics have provided valuable insights into many judicial problems, such as the creation of additional judgeships, necessity for additional professional and clerical help, etc. He is responsible for preparing the budget of the court system and directs the spending of money. His third responsibility is the supervision of the administrative personnel of the lower court system. He may be given additional functions from time to time by the Judicial Conference.

The results have been striking. Judges have been relieved of many administrative functions which previously took far too much time from their judicial activities. The administrative affairs of the federal judicial system have taken on a great degree of uniformity. Efficiency has increased many fold. In a few instances relieving judges of administrative burdens has

⁴⁰ Now incorporated into 28 U. S. C., sec. 601.

meant that no additional judges were necessary in districts where it appeared previously such would be the case.⁴¹

Few states have followed the federal lead. The reason is, in most cases, a very obvious one. Many of the state lower court judges have political reasons for desiring to continue as independent agents in the operation of their portions of the state system. Tradition and inertia, too, play a part in retaining highly decentralized machinery.

The few states that have made centralizing efforts have reaped considerable benefits from the change. The machinery adopted for such centralization has varied greatly from state to state. The New Jersey Constitution of 1947 represents the most complete statement on the subject which has been written into state fundamental law:

1. The Chief Justice of the Supreme Court shall be the administrative head of all the courts in the State. He shall appoint an Administrative Director to serve at his pleasure.

2. The Chief Justice of the Supreme Court shall assign Judges of the Superior Court to the Divisions and Parts of the Superior Court, and may from time to time transfer Judges from one assignment to another, as need appears. . . .

3. The Clerk of the Supreme Court and the Clerk of the Superior Court shall be appointed by the Supreme Court for such terms and at such compensation as shall be provided by law.⁴²

⁴¹ The statement should not be misconstrued. There are still federal district courts which are two to three years behind in their dockets, and one district court is, at present, 51 months behind.

⁴² Art. VI, sec. VII.

Notice that no separate administrative office was established as in the federal system; the Chief Justice is the administrative officer, working through a Director whom he appoints. It is interesting to note that the duties of the Director are left to the discretion of the Chief Justice.

West Virginia, in 1945, enacted a statute modeled quite largely after the federal machinery.⁴³ It provided for an administrative office of the Supreme Court of Appeals.⁴⁴ The director of the office is appointed by the judicial council of the State. In 1937 Connecticut authorized the appointment of an executive secretary. Pennsylvania in that same year adopted a somewhat similar system. New York handles the administrative function in connection with judicial council activities. The proposed Constitution for the State of Hawaii makes the chief justice the administrative head of the courts and empowers him to appoint an "administrative director" to serve at his pleasure. The chief justice is given the power, too, to assign judges from one circuit to another for temporary service.⁴⁵

The unified court system, discussed previously in this Staff Paper, is not absolutely essential to efficient administration of a state court system. It must be emphasized, however,

⁴³ West Virginia Code of 1949, sec. 5194(15).

⁴⁴ The name given the West Virginia high court.

⁴⁵ Art. V, sec. 5.

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that efficient administration is greatly facilitated by such a system. The Delegates to the Alaskan Constitutional Convention will wish to consider, therefore, not only the problem of whether or not the Constitution should make provision for some sort of centralized administration, but whether or not this centralized administration should be tied into a unified judicial machine.

The Judicial Council

Judicial councils are relatively recent innovations on the governmental scene; the first such council was established in Ohio in 1922. A judicial council is a continuing body with the responsibility for conducting regular studies for the improvement of the administration of justice in the state. The council system, to be of fullest value, should be so empowered that its studies may encompass the entire range of judicial activities and operation, including such items as rules, basic court structure, statistics, etc. It may be noted, too, that in the case of New York and a few other states, judicial council activity extends in limited fashion to certain supervisory and administrative functions. Such an activity is not, however, in keeping with the idea of judicial councils as they have ordinarily been conceived and created.

The council reports at regular intervals to the legislature and/or the courts, depending upon the statutory or constitutional requirements placed on it in this regard. Council studies

and recommendations usually require implementation, either by the legislature or by the courts as the case may be. If the constitution or legislature has vested the rule-making power in the courts, then council recommendations on such matters may be implemented without recourse to the legislature. On other matters council recommendations require legislative implementation. It is not ordinarily the purpose of a judicial council to be more than an agency of recommendation.

Thirty-five states have established judicial councils, though four of these organizations are inactive and perhaps eight or ten others almost so. Practically all of them have been established by statute, though an occasional one has been established by a rule of the Supreme Court of the State or by action of the state bar association. The State of California established its judicial council in 1926 by constitutional provision, the only state to have done so. This organization has not only the usual functions but is empowered to adopt rules of practice and procedure not inconsistent with the laws in force.⁴⁶ The Model State Constitution would create a judicial council which would have administrative and quasi-legislative powers as well as the usual research and supervisory functions.⁴⁷

The structure and size of judicial councils varies greatly. From a lower limit of three members in Missouri, size ranges

⁴⁶ Const., Art. VI, sec. 1a.

⁴⁷ Art. VI, sec. 604.

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Summary

The basic problem to be faced by the Delegates relates to constitutional provisions on (1) the organization of the judicial system of the State, (2) the personnel of that system, and (3) the administration of the court system which is established. As various issues arise, the Delegates have before them the basic experiences of other states, most of which have been caught in the toils of overly detailed provisions which have made it impossible for judicial systems to keep pace with the economic and population growth of the states.

The Alaskan Constitutional Convention is in the fortunate position of being able to adopt many of the more modern practices sanctioned by such groups as the American Bar Association and the American Judicature Society. The unified court system, the Missouri Plan for the selection of judges, administrative centralization of the judicial system, power in the courts to establish rules of practice and procedure, the establishment of a judicial council--these and other improvements will necessarily demand careful consideration with a view toward possible incorporation in the fundamental law of Alaska.⁴⁸

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⁴⁸ The Book of the States, 1954-55. (published by the Council of State Governments, contains 7 tables summarizing the judiciary provisions of the 48 states. See pp. 435-442.